TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 229

CONTINENTAL GRAIN COMPANY, PETITIONER,

vs.

BARGE FBL-585, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 21, 1959
CERTIORARI GRANTED OCTOBER 12, 1959

SUPREME COURT OF THE UNITED STATES

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., OCTOBER 26, 1959

[fol. A] Caption omitted.
[fol. B]

IN UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 17499

CONTINENTAL GRAIN COMPANY, Appellant,

versus

FEDERAL BARGE LINES, INC., Appellee.

TRANSCRIPT OF RECORD—Filed December 18, 1958

[File endorsement omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

No. 3656 Admiralty

CONTINENTAL GRAIN COMPANY

versus

FEDERAL BARGE LINES, INC.

APPEARANCES:

Deutsch, Kerrigan & Stiles, Malcolm W. Monroe, Esq., Proctors for Libellant-Appellant.

Lemle & Kelleher, Charles Kohlmeyer, Jr., Esq., Charles Lugenbuhl, Esq., Proctors for Respondent-Appellee.

Appeal from the District Court of the United States for the Eastern District of Louisiana, to the United States

Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 12th day of November, 1958, at the City of New Orleans, La.

[fol. 2]

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed July 2, 1958

The libel of Continental Grain Company against Federal Barge Lines, Inc. and Barge FBL-585, in a cause of cargo damage, civil and maritime, with respect represents:

For a First Cause of Action

First

At all material times, libelant was, and now is, a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business in New York, New York.

Second

At all material times, respondent was, and now is, a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business in the City of New Orleans, owning and/or operating various vessels, including Barge FBL-585, and was, and now is, engaged in business as a common carrier of merchandise by water for hire.

Third

At all material times, Barge FBL-585 was a vessel engaged in the common carriage of goods by water for hire, and is now, or will be during the pendency of process herein, within the jurisdiction of this court.

Fourth

Barge FBL-585 built in 1926, is a steel, house barge, with [fol. 3] a molded length of 230 feet and breadth of 45 feet. She has eight cargo compartments in her hull, four cargo compartments in her house, and has a cargo capacity of

2026 net tons. Her draft, when light, is two feet one inch, and when loaded to capacity, is nine feet.

Fifth

On the morning of November 6, 1957, the Barge FBL-585 which was then light, was lying alongside libelant's wharf at its grain elevator, located on Wolf River in Memphis, Tennessee.

Sixth

The FBL-585 had previously been spotted at the wharf by respondent for the purpose of taking on a cargo of soy-beans, to be loaded by libelant, and to be carried by respondent and the Barge FBL-585 to New Orleans, and there to be delivered in like good order and condition as when received, all in consideration of a certain Column "A" freight rate to be charged thereon.

Seventh

On November 6, 1957, libelant safely and properly loaded aboard said Barge FBL-585 a total of approximately 1320 tons of soy-beans, all in good order and condition.

Eighth

At about 10 PM on said date, libelant discontinued loading operations for the night, intending to complete the load-
[fol. 4] ing of the FBL-585 the following morning.

Ninth

At about 6:50 AM, November 7, 1957, it was discovered that the barge had sunk in Wolf River alongside libelant's wharf, thereby causing severe water-damage to said cargo of soy-beans.

Tenth

Said sinking of the Barge FBL-585 and the resulting damage to her cargo, was caused, not by any negligence on the part of libelant, but, to the contrary, by the unsea-

worthiness of the FBL-585 in the following respects, among others:

1—Her headlog plate, lower knuckle and gunwale bar were heavily distorted, with fractures at nearly every diaphragm plate;

2—The shell plate of her No. 1 starboard wing-tank was fractured;

3—All manhole plates were without gaskets or holding-down gear, some were adrift from their hinges, and none was water-tight.

For a Second Cause of Action

Eleventh

The facts contained in Articles First through Ninth above are reaverred.

Twelfth

Respondent and the Barge FBL-585 received the afore-[fol. 5] said cargo of soy-beans aboard said barge for carriage to New Orleans under the terms and conditions of respondent's customary form of "bargeload traffic" bill of lading, which respondent intended to issue therefor.

Thirteenth

Under the provisions of said bill of lading, respondent assumed the liability of insurer for all damage to, or loss of, the aforesaid cargo which was safely loaded aboard the FBL-585 howsoever said damage or loss occurred.

As to Both Causes of Action

Fourteenth

By reason of the premises, libelant has sustained damages in the sum of $90,000 as nearly as the same can now be estimated, no part of which has been paid although duly demanded.

Fifteenth

At all material times, libelant was the owner of the merchandise described above, and is entitled to maintain this action.

Wherefore, libelant prays that:

(1) Process issue against respondent, citing it to appear and answer this libel;

(2) Process issue against the Barge FBL-585 and that all persons claiming any interest in said vessel be cited to appear and answer this libel;

[fol. 6] (3) The court decree that respondent pay to libelant the damages suffered by it, together with interest thereon and its costs and disbursements;

(4) The Barge FBL-585 be condemned and sold to pay the amount due libelant herein; and

(5) Libelant have such other and further relief as justice may require.

Deutsch, Kerrigan & Stiles, 1800 Hibernia Bank Building, New Orleans, Proctors for Libelant.

Malcolm W. Monroe, Advocate.

June 26, 1958.

Duly sworn to by Theodore Ness, jurat omitted in printing.

[fol. 7]

In United States District Court

Stipulation for Costs—Filed July 2, 1958

Know All Men by These Presents that we, Continental Grain Company, as principal, and The Fidelity & Casualty Company of New York, as surety, are bound to the Barge FBL-585 in the sum of two hundred fifty ($250) dollars, to the payment whereof we bind ourselves, our successors and assigns, jointly and severally by these presents:

Whereas Continental Grain Company is about to file its libel in rem against the Barge FBL-585 in the United States District Court in and for the Eastern District of Louisiana, in a cause of cargo damage, civil and maritime;

Now Therefore, the condition of this obligation is such that if said Continental Grain Company shall prosecute its claim as aforesaid, and shall abide all orders, interlocutory and final, of the aforesaid Court, and pay all costs and expenses, if such shall be awarded against it by final decree of the aforesaid court, then this obligation shall be void; otherwise to remain in force.

Executed at New Orleans, on July 1st, 1958.

[fol. 8] Continental Grain Company, By: Deutsch, Kerrigan & Stiles, Proctors.

The Fidelity & Casualty Company of New York, By: A. Leonard Robinett, Attorney-in-fact.

IN UNITED STATES DISTRICT COURT

CLAIM—Filed July 29, 1958

Comes now Federal Barge Lines, Inc., through its proctors of record, Lemle & Kelleher, and shows that it is the sole and only owner of the Barge FBL 585, proceeded against herein, and claims the said barge as owner and prays that it be permitted to defend according to law.

New Orleans, Louisiana, July 28, 1958.

Charles E. Lugenbuhl, Proctor for Federal Barge Lines, Inc.

[fol. 9] *Duly sworn to by Charles E. Lugenbuhl, jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

ANSWER—Filed September 18, 1958

Now comes Federal Barge Lines Inc. and for answer to the libel of Continental Grain Company with respect represents that:

1.

The allegations of paragraph 1 are admitted.

2.

The allegations of paragraph 2 are admitted, except that it denies that its principal office is in New Orleans and avers that such principal office is in St. Louis, Missouri.

3.

The allegations of paragraph 3 are admitted except that respondent shows that FBL 585 is a dumb barge.

4.

The allegations of paragraph 4 are admitted.

[fol. 10]

5.

The allegations of paragraph 5 are admitted.

6.

The allegations of paragraph 6 are admitted except that respondent shows that Barge FBL 585 had been spotted at the Elevator of libelant for the purpose of discharging a cargo of grain, which discharge had been completed prior to November 6, 1957.

7.

The allegations of paragraph 7 are denied.

8.

For lack of sufficient information to justify a belief, respondent denies the allegations of paragraph 8.

9.

The allegations of paragraph 9 are admitted.

10.

The allegations of paragraph 10 are denied.

11.

Paragraph 11 of the libel requires no answer.

12.

The allegations of paragraph 12 are denied, except that respondent admits that it was intended that the form of bill of lading set forth in respondent's tariff covering movements of bulk grain from Memphis to New Orleans on "A" rates was to be issued.

[fol. 11]

13.

The allegations of paragraph 13 are denied.

14.

For lack of sufficient information to justify a belief, the allegations of paragraph 14 are denied.

15.

The allegations of paragraph 15 are admitted.

16.

Further answering the libel respondent shows that its Barge FBL 585 was at all times referred to in the libel sound, staunch, strong and seaworthy in all respects and was fit and suitable for the carriage of a cargo of soybeans from Memphis to New Orleans; that libelant, its agents, servants and employees caused the barge to be improperly loaded or misloaded on or about November 6/7, 1957 to such an extent as to force the bow of the barge down to the bottom of the berth in which she was then lying; that the cargo which libelant claims was lost by virtue of the occur-

rence was in fact lost or damaged by reason of the fault, neglect and lack of care of libelant, its agents, servants and employees in loading and trimming the cargo and in overloading or failing properly to load the said barge so as to cause it to go down by the head.

17.

Further answering the said libel respondent shows that [fol. 12] it has heretofore filed a suit in the Circuit Court of Shelby County, Tennessee against libelant for the amount of $75,000.00, for damages sustained by its barge in the incident referred to in the libel. Respondent reserves all the rights which it may have to urge in its said cause of action as a counter-claim herein in the event that such claim be considered as a mandatory counter-claim or cross libel under the circumstances set forth.

Wherefore, respondent prays that libelant's libel may be dismissed at its cost; and for such other and further relief as may be meet and proper in the premises and this court competent to grant.

Lemle & Kelleher, By Charles Kohlmeyer, Jr., 1836 National Bank of Commerce Bldg., New Orleans, Louisiana, Proctors for Respondent.

[fol. 13] *Duly sworn to by Charles Kohlmeyer, Jr., jurat omitted in printing.*

Certificate of service (omitted in printing).

[fol. 14]

IN UNITED STATES DISTRICT COURT

MOTION TO TRANSFER CASE TO WESTERN DISTRICT OF TENNESSEE—Filed October 13, 1958

Now comes Federal Barge Lines Inc., and move the Court for an order transferring this action to the United States District Court for the Western District of Tennessee, Western Division, on the ground that such transfer is necessary for the convenience of the parties and witnesses and in the

interest of justice as will appear from the affidavit attached hereto and made part hereof.

Charles Kohlmeyer, Jr., 1836 National Bank of Commerce Building, New Orleans, La.

Of Counsel, Lemle & Kelleher.

Burch, Porter, Johnson & Brown, 128 North Court Avenue, Memphis, Tennessee, Proctors for Respondent.

AFFIDAVIT OF CHARLES KOHLMEYER, JR.

State of Louisiana
Parish of Orleans

Before me, the undersigned authority, personally came and appeared Charles Kohlmeyer, Jr. who, being first daly sworn, did depose and say:

I am a member of the firm of Lemle & Kelleher, counsel [fol. 15] for Federal Barge Lines, Inc. I personally investigated the facts surrounding the claim which is the basis of this libel and am the individual member of my firm charged with primary responsibility for this litigation.

On June 27, 1958, there was filed in the Circuit Court of Shelby County, Tennessee a suit at law wherein Federal Barge Lines Inc. sought a recovery of $75,000.00 from Continental Grain Company for damages suffered by it in the sinking of Barge FBL 585. It was alleged in the declaration that the barge was sunk through the negligence or fault of Continental Grain Company employees.

Sometime thereafter, on July 15, 1958, Continental Grain Company appeared and caused the cause to be removed to the United States District Court for the Western District of Tennessee, Memphis Division. Federal Barge Lines appeared and filed a motion to remand. Argument on the foregoing motion was heard before Judge J. D. Martin of the Court of Appeals for the Sixth Circuit, sitting by designation as District Judge, on September 12, 1958. After hearing argument of counsel, the Court ordered that the motion to remand be denied and the cause was retained in the United States District Court for the Western District of Tennessee, Memphis Division, Docket No. 3487. Trial on

the merits has been fixed before Judge Martin, sitting by designation, on November 19, 1958.

On July 2, 1958, Continental Grain Company filed this [fol. 16] suit against Federal Barge Lines, Inc. in this Honorable Court. An answer has been filed, and a motion to transfer the cause to the United States District Court for the Western District of Tennessee, Memphis Division, on the grounds of *forum non conveniens* is now before the Court.

The parties to this litigation are identical, the subject matter of each case is the incident wherein the FBL 585 sunk at Continental Grain Company's dock in Memphis; on the one hand, Federal Barge Lines in seeking recovery from Continental Grain for the cost of salving and repainting the barge, charging negligence on the part of the Continental Grain, in overloading or improperly loading the barge; on the other hand, Continental is seeking damages from Federal Barge Lines for the loss of its cargo of soybeans laden in the barge when it sunk, charging unseaworthiness of the barge.

Federal Barge Lines Inc. is a common carrier by water, certificated under Part III of Interstate Commerce Act. It is a Delaware corporation having its principal offices in St. Louis, Missouri. It has freight soliciting representatives in various places along the Mississippi River, including Memphis and New Orleans.

No witnesses involved in this case live in or about the vicinity of New Orleans other than the hull and cargo surveyors who were consulted. There were three sets of hull surveyors involved, only one of whom lives in New Orleans, [fol. 17] the other two working out of St. Louis and Memphis, respectively. All fact witnesses relative to the loading (there apparently were six) are employees of Continental Grain Company and are residents of and domiciled in Memphis. Continental Grain elevator and office or administrative personnel who may have to testify are located in Memphis. Other fact witnesses who may be called upon to testify as to the level of the river, weather conditions and the ordering or placing of the barge live in Memphis. No witnesses live in New Orleans other than the surveyors,

and New Orleans has no connection with the litigation other than the fact that the barge may physically be located here.

The foregoing facts are within affiant's own knowledge or have been ascertained by close investigation and inquiry and are believed to be accurate.

Charles E. Kohlmeyer, Jr.

Sworn to and subscribed before me this 13th day of October, 1958.

William Stern, Jr., Notary Public.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF MALCOLM W. MONROE—Filed October 14, 1958

State of Louisiana
Parish of Orleans:

Before me, the undersigned authority, personally ap- [fol. 18] peared Malcolm W. Monroe, who being first duly sworn, deposed that;

He is a member of the firm of Deutsch, Kerrigan, & Stiles proctors for libelant herein; he personally investigated the facts surrounding libelant's claim; and on the basis of that investigation, and the data and documents included in the file which is in the custody of the firm as proctors for libelant, he makes this affidavit as to the following facts:

Barge FBL-585 was raised and floated approximately one week after she had sunk at Continental Grain Company's elevator at Memphis. Shortly thereafter, she was moved to the port of New Orleans, where she was tied up at Federal Barge Line's upper fleet in the Mississippi River at or near the foot of Carrollton Avenue. She has remained there since, having been retired from active service by Federal Barge Lines.

Affiant has been informed by representatives of Federal Barge Lines that the FBL-585 is considered to have scrap value only, and that she will not be moved, as a vessel, from this port. The barge has accordingly never returned, and will never return, to the Western District of Tennessee. To

the contrary, the barge is within this district, where she undoubtedly will be available for viewing and inspection by this court during trial, should the court so desire. She was at the time of filing of the libel herein, and still is, subject to the jurisdiction of this court only.

On November 14, 1957, the FBL-585 was surveyed while [fol. 19] afloat at Memphis by the following representatives of the interested parties.

1—Mr. E. M. Merrill, of Merrill Marine Service, of St. Louis, Missouri, acting for underwriters of Federal Barge Lines;

2—Mr. Fred Hunt, of Messrs. Hunt, Leithner & Company, of Chicago, Illinois, representing Inland Survey Bureau, Inc., of New York City, acting for the liability underwriters of Continental Grain Company;

3—Mr. Stanley M. Lecourt, marine engineer and surveyor, of New Orleans, acting for cargo underwriters of Continental Grain Company.

In addition, the cargo was surveyed and salvaged by Messrs. John A. McKee & Company, of New Orleans, acting for Continental Grain Company and its cargo underwriters.

On or about August 7, 1958, the FBL-585 was again surveyed, while afloat at Federal Barge Lines' fleet at this port, by Mr. William R. Bagger, of New York City, acting for the liability underwriters of Continental Grain Company.

Affiant knows of no hull surveyor who, as stated in the affidavit of Mr. Charles Kohlmeyer, Jr., works "out of Memphis" but as shown hereinabove, all surveyors reside outside the Western District of Tennessee, and the cargo surveyors and one of the hull surveyors reside within the [fol. 20] Eastern District of Louisiana.

Prior to the filing of either the action in the state court at Memphis ("Federal Barge Lines, Inc. vs. Continental Grain Company"), or the instant one in this district, proctors for, and other representatives of, the interested parties met in New York City to discuss possible amicable adjustment of the various claims which arose as a result of the

sinking of the FBL-585. At this meeting, it was agreed that the depositions of the employees of Continental Grain Company who had knowledge of the facts surrounding the loading of the barge, would be taken prior to the filing of any action by any party, the object being not only to have a full disclosure of the facts with the view of facilitating possible settlement of the claims, but also to preserve the testimony of the witnesses for use in any action which might be filed in any court by the parties.

Pursuant to this agreement, on May 14, 1958, the depositions of the following employees of Continental Grain Company were taken at Memphis:

1—Harry Albright, elevator superintendent, who was on duty during the day shift of November 6 and 7, 1957;

2—Roosevelt Sales, laborer, who was in direct charge of loading of the barge during the day shift of November 6, 1957;

3—Andrew C. Phelan, elevator foreman, who was on duty during the night shift of November 6, 1957;

[fol. 21] 4—Clarence Johnson, laborer, who was in direct charge of loading of the barge during the night shift of November 6, 1957;

5—Jack Gordon, vice-president in charge of the Memphis office.

To the best of affiant's present knowledge, information and belief, these are the only employees of Continental Grain Company who have knowledge of any pertinent facts as to the loading and sinking of the FBL-585.

The depositions were attended by affiant, acting for Continental's cargo underwriters; Mr. George B. Warburton, acting for Continental's liability underwriters; and Mr. Charles Kohlmeyer, Jr., acting for Federal Barge Lines and its underwriters.

Thereafter, when it became apparent that Federal Barge Lines was not willing to consider amicable settlement of the claims, this action was filed on July 2, 1958, against the FBL-585, *in rem*, and Federal Barge Lines, Inc., *in per-*

sonam. Later on the same day, affiant learned for the first time that Federal Barge Lines had filed suit against Continental Grain Company in the state court at Memphis, which suit is being defended by Continental's liability underwriters represented by Messrs. Hill, Rivkins, Middleton, Louis & Warburton of New York City.

On July 28, 1958, Federal Barge Lines, Inc. appeared [fol. 22] herein and filed claim to the FBL-585; and also issued its letter of undertaking, dated July 23, 1958, a photostat of which is annexed hereto and made part hereof. On or about September 15, 1958, respondent filed its answer to the libel.

Affiant, on behalf of libelant, contemplates taking additional depositions of witnesses other than residents of Memphis, and it presently appears that this case will not be ready for trial on November 19, 1958, even should it be transferred to Memphis. Proctor for claimant-respondent has advised affiant that Federal Barge Lines intends to give notice of the taking of a deposition of a witness at Kansas City, Missouri, for use in both this proceeding and the one now pending in the Federal Court for the Western District of Tennessee.

Malcolm W. Monroe

Sworn to and subscribed before me this 14th day of October, 1958.

Julian H. Good, Notary Public.

IN UNITED STATES DISTRICT COURT

LETTER FROM FEDERAL BARGE LINES, INC.
TO CONTINENTAL GRAIN COMPANY
DATED JULY 23, 1958

FEDERAL BARGE LINES
Telephone: Vernon 2-4000

611 East Marceau St.
St. Louis 11, Mo.

Continental Grain Company
c/o Messrs. Deutsch, Kerrigan & Stiles
1800 Hibernia Bank Building
New Orleans, Louisiana

[fol. 23] Re: Continental Grain Company
vs Federal Barge Lines, Inc.
and Barge FBL 585
No. 3656 In Adm. E. D. La.

Gentlemen:

In consideration of your not having seized, under the *in rem* process which has been issued in the captioned action, our Barge FBL 585, which is presently tied up at our fleet in the port of New Orleans within the jurisdiction of the United States District Court for the Eastern District of Louisiana; and in further consideration of our not being required to post the usual bond for the release of that vessel.

We agree that we shall, within the delays allowed by law and/or the rules of court, file claim to Barge FBL 585 and pleadings in the above entitled and numbered action, and that, vessel lost or not lost, we shall pay any final decree which may be rendered against said vessel in said proceeding.

It is the intent of this undertaking that the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in*

rem process, and released by the filing of claim and release bond we, as claimant, reserving in behalf of the vessel all other objections and defenses otherwise available except those which might be predicated upon the fact that the vessel was not actually so seized.

[fol. 24] Very truly yours, Federal Barge Lines, Inc.

By Noble C. Parsonage, Vice President-Treasurer.

IN UNITED STATES DISTRICT COURT

STIPULATION

In Re: Sinking of Barge FBL 585 at Memphis, on November 6-7, 1957.

Stipulation

It is stipulated by and between Continental Grain Company and its underwriters, and the Federal Barge Line, Inc., and its underwriters, that the testimony taken may be used in any litigation involving any of the parties concerning the above occurrence, in any United States Court where jurisdiction may exist, to the same extent as if such litigation were now pending, and the witnesses produced were produced by the Continental Grain Company and its underwriters.

It is further stipulated that the depositions are taken as if the Federal Laws of Civil Procedure were applicable, except that all objections, except as to the form of question, are reserved to the parties, and signing, sealing and filing are waived.

The cost of the taking of the depositions, including one original and one copy to each of the three interested parties, will be a taxable cost if litigation ensues, otherwise, the cost [fol. 25] will be borne one-third for each interested party.

In United States District Court

Minute Entry of Hearing on Motion of Respondent to Transfer Case to Western District of Tennessee and Order Granting Same—October 16, 1958

Wright, J.:

This matter came on for hearing on respondent's motion to transfer this case to the United States District Court for the Western District of Tennessee under 28 U.S.C. §1404 (a).

Present:

Malcolm Monroe, Esq., Proctor for Libellant.

Charles Kohlmeyer, Jr., Esq., Proctor for Respondent.

The Court, having heard the argument of counsel and studied the briefs submitted in support thereof, is now ready to rule.

It Is Ordered that this case be, and the same is hereby transferred to the United States Court for the Western District of Tennessee.

It Is Certified that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

Per Curiam

The damage to the cargo in suit occurred in Memphis [fol. 26] when the barge into which it was being loaded at libellant's grain elevator sank. The barge, owned by respondent herein, was also damaged. That damage is the subject of a suit between these parties now pending in the Western District of Tennessee. Most of the witnesses to the sinking reside in Memphis. Although the case pending in Memphis will be tried to a jury, the issue therein, that is, the cause of the casualty, is precisely the issue in the case at bar. The convenience of the great majority of witnesses in this

case dictates that this case be tried in Memphis. The efficient administration of justice requires that this claim for cargo damage be tried by the same court which is trying the claim for hull damage, both claims being between the same parties, and relate to the same incident.[1]

The libel is in rem as to the Barge FBL-585. While this libel could have been originally brought in the Western District of Tennessee against the respondent, Federal Barge Lines, the owner of the barge, the libel as to the barge itself would ordinarily be restricted to the place where the barge [fol. 27] is located at the time the libel is filed.[2] At that time, and now, the barge is located in this district. However, since the barge was neither seized by the Marshal nor bonded by respondent, libellant having accepted respondent's letter undertaking to respond to any decree entered herein, and since the owner thereof, Federal Barge Lines, apparently is financially able to respond to any decree rendered against it, the interest of justice would best be served by, for the reasons above stated, transferring this case to the Western District of Tennessee. Since this order to transfer does involve a serious question of law under 28 U.S.C. §1404 (a), that is, the right to transfer the case as against the barge to the Western District of Tennessee,[3] this Court has certified this order for appeal under 28 U.S.C. §1292 (b).

---

[1] Since the suit in the Western District of Tennessee was filed before the one here, it may be that the defendant there, the libellant here, is required to counterclaim in that action for its cargo damage. See Rule 13 (2) Fed. R. Civ. P. Moreover, since the case there is to be tried on the merits on November 19, 1958, a final judgment rendered therein may bar further prosecution of the suit here under the principle of collateral estoppel. See Restatement, Judgments §58 c.

[2] Clinton Foods v. United States, 4 Cir., 188 F. 2d 289; Broussard v. The Jersbek, 140 F. Supp. 851; New Jersey Barging Corp. v. T. A. D. Jones & Company, 135 F. Supp. 97; United States v. 11 Cases, etc., 94 F. Supp. 925.

[3] See Deepwater Exploration Company, et al v. Andrew Weir Insurance Co., Ltd. et al, D.C. ED. La., October 3, 1958, F. Supp. ; and cases cited in Note 2.

IN UNITED STATES DISTRICT COURT

MOTION FOR STAY OF ORDER TO TRANSFER—
Filed October 17, 1958

On motion of libelant, and on suggesting to the court that libelant intends to apply to the Court of Appeals for the Fifth Circuit, under the provisions of the Interlocutory Appeals Act (28 USC 1292 (b)), for allowance of an appeal [fol. 28] from the order of this court entered October 16, 1958, transferring this proceeding to the United States District Court for the Western District of Tennessee, which order this Court certified that a controlling question of law as to which there is substantial ground for difference of opinion is involved, and that an immediate appeal from this order may materially advance the ultimate termination of this litigation; and

On further suggesting to the court that libelant requires ten days within which to prepare and have printed the necessary application for allowance of appeal and supporting documents; and that it therefore desires a stay of the aforesaid order of this court pending the timely filing of the application for appeal and final action by the Court of Appeals for the Fifth Circuit on the application, and, if granted, on the appeal:

It Is Ordered that execution of this court's order dated October 16, 1958, transferring this proceeding to the United States District Court for the Western District of Tennessee be, and it hereby is, stayed for a period of ten days from and after the entry of this present order pending timely filing with the Court of Appeals for the Fifth Circuit of an application for allowance of an appeal from the aforesaid order dated October 16, 1958; and on timely filing of such application, this stay shall continue and remain in effect until the action of the Court of Appeals for the Fifth Circuit on such application, and, if granted on the appeal, shall [fol. 29] have become final.

New Orleans, October 20th, 1958.

J. Skelly Wright, United States Judge.

Deutsch, Kerrigan & Stiles, 1800 Hibernia Bank Building, New Orleans, Proctors for libelant.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed November 12, 1958

Sirs:

Please take notice that, pursuant to the order of the United States Court of Appeals for the Fifth Circuit, entered on November 10, 1958, granting libelant permission, under the Interlocutory Appeals Act (28 USC 1292 (b)), to take an appeal from the interlocutory order of this court, dated October 16, 1958, transferring this action to the United States District Court for the Western District of Tennessee, libelant hereby appeals to the United States Court of Appeals for the Fifth Circuit from said interlocutory order.

New Orleans, November 11, 1958.

Deutsch, Kerrigan & Stiles, Proctors for Libelant-Appellant.

Malcolm W. Monroe, Advocate.

To: Honorable A. Dalham O'Brien, Clerk of Court.
[fol. 30] Charles Kohlmeyer, Jr. Esq., Messrs. Lemle & Kelleher, National Bank of Commerce Building, New Orleans, Proctors for Claimant-Respondent.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed November 12, 1958

Libelant hereby assigns error in the order of this court entered herein on October 16, 1958, transferring this action to the United States District Court for the Western District of Tennessee, as follows:

The court erred in holding that an admiralty action in rem may be transferred, under 28 USC 1404 (a), to a district other than that "where it might have been brought" because the res was not located in that district at the time of filing of either the libel or the motion to transfer.

Malcolm W. Monroe of Deutsch, Kerrigan & Stiles, Proctors for Libelant-Appellant.

New Orleans, November 11, 1958.

IN UNITED STATES DISTRICT COURT

PRAECIPE—Filed November 12, 1958

To: Honorable A. Dallam O'Brien, Clerk, United States District Court, Eastern District of Louisiana.

Sir:

[fol. 31] Libelant hereby requests that the record on appeal in this action include the following:

1. Libel.

2. Stipulation for costs.

3. Claim of Federal Barge Lines, Inc. to Barge FBL-585.

4. Answer of claimant-respondent.

5. Motion to transfer cause.

6. Affidavit of Charles Kohlmeyer, Jr. in support of motion.

7. Affidavit of Malcolm W. Monroe in opposition to motion, including:

a. Letter of undertaking, dated July 23, 1958, of Federal Barge Lines, Inc., annexed thereto.

8. Stipulation of the parties, dated May 14, 1958, for taking and using depositions of Harry Albright, Roosevelt Sales, Andrew C. Phelan, Clarence Johnson and Jack Gordon, which is included in the transcript of said depositions taken at Memphis on said date.

9. Minute entry and opinion *per curiam*, dated October 16, 1958.

10. Motion and order, dated October 20, 1958, staying order to transfer this cause.

11. Notice of appeal.

12. Assignment of errors.

13. This praecipe.

Respectfully, Malcolm W. Monroe of Deutsch, Kerrigan & Stiles, Proctors for Libelant-Appellant.

New Orleans, November 11, 1958.

[fol. 32] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 33]

IN UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 17499

CONTINENTAL GRAIN COMPANY, Petitioner-Libelant Below

versus

FEDERAL BARGE LINES, INC., Respondent-Claimant Below

and

BARGE FBL-585

PETITION FOR ALLOWANCE OF APPEAL FROM INTERLOCUTORY ORDER—filed November 10, 1958

Malcolm W. Monroe, Proctor for Petitioner.

Deutsch, Kerrigan & Stiles, Eberhard P. Deutsch, Of Counsel.

[File endorsement omitted]

[fol. 34]

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LIST OF AUTHORITIES

[fol. 35]

II

LIST OF AUTHORITIES—(Continued)

[fol. 36]

[fol. 37]

IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17499.

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL FROM INTERLOCUTORY ORDER—filed November 10, 1958

Pursuant to the provisions of the Interlocutory Appeals Act of September 2, 1958,[1] petitioner prays for allowance of an appeal from the order entered by the United States District Court for the Eastern District of Louisiana, on Octo-
[fol. 38] ber 16, 1958, transferring this admiralty action

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[1] 72 Stat. 1770, 28 USC 1292(b); reprinted in Appendix A. Under the Act, the remedy afforded an aggrieved party is to file with the Court of Appeals a petition for allowance of an appeal, in much the same way as a petition for writ of certiorari is filed with the Supreme Court. See Hearings before Subcommittee No. 3 of the Committee of the Judiciary, House of Representatives, on H. R. 6238, at p. 18.

in rem and *in personam* to the United States District Court for the Western District of Tennessee.

In its order, the District Court certified that "a controlling question of law as to which there is substantial ground for difference of opinion" is involved, and that "an immediate appeal from this order may materially advance the ultimate termination of this litigation."

In support of this petition for allowance of appeal, petitioner respectfully shows:

I

Question Presented

The controlling question of law presented for determination in this proceeding is:

> May an admiralty action *in rem* be transferred, under 28 USC 1404(a),[2] to a district other than that "where it might have been brought," because the *res* was not located in that district at the time of filing of either the libel or the motion to transfer?

When the case at bar was instituted by libel *in rem*, the vessel was not actually seized physically, but proctors for the owner appeared voluntarily and gave a letter of undertaking in lieu of a release bond—a customary procedure for the convenience of all concerned.

[fol. 39] The district judge conceded, of course, that a libel *in rem* may be brought only in the district in which the vessel is located when the libel is filed.

But the court held that because the vessel had not actually been seized physically by the marshal under formal process, and bonded, the action *in rem* could be transferred to a district in which the proceeding could not have been instituted originally.

The parties had stipulated that "the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in*

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[2] Reprinted in Appendix A.

rem process, and released by the filing of claim and release bond."

Thus, implicit, if not expressed, in the district court's affirmative answer to the question presented in this case, is its holding that, in all actions *in rem*, vessels must be seized physically by the marshal and bonded, under formal process; and that a libelant and vessel-owner may not effectively and without prejudice, enter into a stipulation for release before seizure.

The district court, recognizing that there was substantial ground for an opinion different from its own, and that an immediate appeal may materially advance the ultimate termination of this litigation, stayed its order pending action by this court on this petition.

[fol. 40]

II

Jurisdiction and Opinion Below

Jurisdiction of this court is invoked under 28 USC 1292 (b).

The district court rendered no formal written opinion, but with its order of October 16, 1958, made a *per curiam* comment included among the relevant portions of the record printed herewith as Appendix B.

III

Summary Statement of the Matter Involved

The proceeding at bar was instituted on July 2, 1958, through libel in admiralty by the owner (petitioner) of cargo on a barge which had sunk in Wolf River at Memphis. The action is *in rem* against the barge, and *in personam* against the owner of the barge.

Shortly after her sinking, the barge was raised and moved to the port of New Orleans, where she remains.

Thus, at the time of the filing of the libel and of the motion to transfer, the vessel was, and still is, within the Eastern District of Louisiana, and subject to jurisdiction *in rem* only within that district.

After the libel was filed, the owner of the barge issued to petitioner its letter of undertaking, "in consideration of [fol. 41] (petitioner) not having seized, under the *in rem* process which has been issued in the captioned action, our Barge FBL-585, which is presently tied up at our fleet in the port of New Orleans within the jurisdiction of, the United States District Court for the Eastern District of Louisiana; and in further consideration of our not being required to post the usual bond for the release of that vessel," the owner agreed that it would "file claim to Barge FBL-585, and pleadings," and "that, vessel lost or not lost, (it would) pay any final decree which may be rendered against said vessel in said proceeding."

The undertaking further stipulated that "the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in rem* process, and released by the filing of claim and release bond."

In due course, the barge-owner appeared in the proceeding and filed claim. Thereafter it filed its answer to the libel, in which it admitted that the barge "is now, or will be during the pendency of process herein, within the jurisdiction of this court."

Next, claimant-respondent (Federal Barge Lines) filed a motion to transfer this proceeding to the United States District Court for the Western District of Tennessee, where it had instituted a civil action against petitioner to recover [fol. 42] for the damage sustained by its barge as a result of the sinking.[1]

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[1] Appendix B, Item 2.

[2] That action is in fact being defended by the liability insurer of Continental Grain Company, the named defendant, which is represented by counsel other than proctors for petitioner herein, who have had no part in the defense of that action. Shortly after the libel in admiralty was filed in the Eastern District of Louisiana, proctors for petitioner learned for the first time of the filing of the action in Tennessee.

That action was originally filed at law in the state court of Tennessee, but was subsequently removed to the federal court which refused to remand it.

In granting the motion to transfer, the District Court held that "although the case pending in Memphis will be tried to a jury, the issue therein, that is, the cause of the casualty, is precisely the issue in the case at bar"; and that "the efficient administration of justice requires that this claim for cargo damage be tried by the same court which is trying the claim for hull damage, both claims being [fol. 43] between the same parties, and relate to the same incident."[6]

With respect to the *in rem* action, the district court found that the *res* could only be found in this district, and

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[6] The District Court, apparently as justification for its order to transfer, suggests, in its *per curiam*, that "since [ ] suit in the Western District of Tennessee was filed before the one here, it may be that the defendant there, the libelant here, is required [under Rule 13(a), Fed. R. Civ. P.] to counterclaim in that action for its cargo damage." But the vessel was not a party to the Tennessee proceedings, and accordingly not subject to counterclaim at all. Further, Rule 82 of the Federal Rules of Civil Procedure provides that the rule shall not be construed to extend the jurisdiction of the district courts; and since the federal court, on its civil side, could not have jurisdiction over an admiralty action *in rem*, it is clear that defendant cannot be required to file such a "third-party" action *in rem* in the pending civil action in Tennessee, where the vessel is not to be found in any event. See Noma Electric Corp. v. Polaroid Corp., 2 FRD 454 (SD N.Y.-1942); Milburn v. Proctor Trust Co., 54 FS 989 (WD La.-1944).

[7] Appendix B, Item 5. The court also stated that the "convenience of the great majority of witnesses in this case dictates that this case be tried in Memphis." But the depositions of petitioner's employees, who are the only fact witnesses with respect to loading of the barge and events surrounding her sinking, were taken by agreement of the parties prior to commencement of any litigation with the understanding that those depositions could be used in such a proceeding as the instant one (see also stipulation in depositions, Appendix B, Item 1). Further, none of the four hull surveyors and one cargo surveyor is a resident of the Western District of Tennessee, two being residents of New Orleans, the others being residents of New York, Chicago and St. Louis. Claimant-respondent merely averred that "other fact witnesses who may be called upon to testify as to the level of the river, weather conditions and the ordering or placing of the barge live in Memphis."

was not subject to the jurisdiction of the court for the Western District of Tennessee.

But the court held that "since the barge was neither seized by the Marshal nor bonded by respondent, libelant having accepted respondent's letter undertaking to respond to any decree entered herein, and since the owner thereof, Federal Barge Lines, apparently is financially able to respond to any decree rendered against it, the interest of justice would best be served by, for the reasons above stated, transferring this case to the Western District of Tennessee."

The court concluded, however, that its "order to transfer does involve a serious question of law under 28 U.S.C. 1404(a), that is, the right to transfer the case as against [fol. 44] the barge to the Western District of Tennessee," and therefore "certified this order for appeal under 28 U.S.C. 1292(b)."

IV

Reasons Relied on for Allowance of an Appeal

The order of the District Court contravenes a fundamental premise for application of the *forum-non-conveniens* statute.[7] For "in all cases in which the doctrine of *forum non conveniens* comes into play it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."[8]

Under the specific provision of subsection (a) of Section 1404 of the Judicial Code, a court is empowered to transfer an action only to a district "where it might have been brought."[9]

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[7] 28 USC 1404(a).

[8] Gulf Oil Corporation v. Gilbert, 330 US 501, 506 (1947); followed in Wilson v. Seas Shipping Corp., 78 FS 464 (ED Pa.-1948); Neal v. Pennsylvania R. Co., 77 FS 423 (SD N.Y.-1948); Mazinski v. Dight, 99 FS 192 (WD Pa.-1951); Herzog v. Central Steel Tube Co., 98 FS 607 (SD Iowa-1951).

[9] This, of course, is not a case in which a defendant may consent to personal service, and waive objection to the venue of a district in which he is not subject to service. *Cf.* Ex parte Blaski, 245 F2d 737 (CA 5-1957).

And "it is well settled that a proceeding *in rem* against specific property is local in character and must be brought where the property is subject to seizure under process of [fol. 45] the court. Since the suit . . . could not have been brought in any other district than that in which (the property was) seized, it is clear that it may not be transferred from that district under the provisions of 28 USCA Sec. 1404(a)." [10]

The recent case of *Broussard* v. *The Jersbek* is strikingly similar to the instant one.[11]—In that case, a libel *in rem* against the *Jersbek* was filed in New York to recover for injuries sustained as a result of a collision between that vessel and a tug in the Houston Ship Channel.

Libelant had previously filed, in Texas, a libel *in rem* against the tug, claiming damages for the same injuries, but the *Jersbek* could not be found within that district.

Libelant moved to transfer the *in rem* action against the *Jersbek* to Texas, where the other action was then pending. It is obvious that the real object of that motion, as is true of the instant one, was to have the two actions, which arose out of the same incident, tried before the same court.

The reasoning of the district court in the instant case—that, since "the issue therein, that is, the cause of the casualty, is precisely the issue" in the other proceeding, [fol. 46] "the efficient administration of justice requires" that the two cases be tried by the same court—was unquestionably equally applicable in the *Jersbek* case.[12]

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[10] Clinton Foods, Inc. v. United States, 188 F2d 289, 292 (CA 4-1951). See also United States v. 11 Cases, More or Less, Ido-Pheno-Chon, 94 FS 925, 927 (D. Ore.-1950): "Title 28 U.S.C.A. Sec. 1404(a) gives power to transfer any civil action to any district where it might have been brought. This action could only have been brought in Oregon, because here alone was the res 'found'."

[11] 140 FS 851 (SD N.Y.-1956).

[12] In fact, in *Jersbek* the two actions could have been tried "by the same court," since they were both admiralty proceedings. That is not true of the instant case and the action pending in Tennessee, because the former is an admiralty proceeding to be tried by the judge, while the latter is a civil action to be tried by a jury.

But in the *Jersbek* case, the court denied the motion to transfer, holding that "an *in rem* action might be brought only in the district where the res is or will be located at the time of commencement of the action," and that accordingly, the Texas district was not one "where (the action) might have been brought," as required by Section 1404(a).[13]

As was true of the *Jersbek*, the FBL-585 was, at the time this libel was filed, and still is, within the Eastern District of Louisiana where this *in rem* proceeding was filed. The vessel has never returned to Memphis since she was raised and brought to New Orleans, and there is no prospect of her ever returning to the Western District of Tennessee.

The district judge's order transferring this admiralty action *in rem* to that district, accordingly clearly con- [fol. 47] travenes the express requirement of the statute that such a transfer may not be to a district other than one in which the action might have been brought.

The court below apparently concluded that that statutory requirement may be ignored when the vessel proceeded against *in rem* is not actually seized by the marshal.[14]

But claimant-respondent specifically agreed that, in consideration of libelant refraining from having the vessel seized, "the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in rem* process, and released by the filing of claim and release bond."

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[13] Broussard v. The Jersbek, 140 FS 851, 852 (SD N.Y. 1956): "The affidavit in opposition to this motion indicates that the S.S. Jersbek is not now in a Texas port and that the ship has not returned to a Texas port since the collision. Therefore, since the ship presently cannot be attached in Texas, an action cannot now be brought in a district court in that state. Furthermore, it does not appear that an action might have been brought in Texas at the time when this action was instituted."

[14] Claimant-respondent made no such contention in the court below, either in its written memorandum or in oral argument. Nor was this position raised by the district court prior to issuance of its *per curiam*.

And the owner of the vessel stipulated that, in lieu of having its vessel physically arrested under the *in rem* process which had issued, it would file claim to the vessel, defend the *in rem* action and pay any judgment which might be rendered against the vessel.[15]

That the vessel was not actually seized is, under these circumstances, of no moment.[16] The undertaking given by [fol. 48] the vessel-owner is, in effect, and for all practical purposes, a release bond.

The stipulation of the parties was consistent with the practice which has been honored in the admiralty for many years. Had this agreement "not been made, process undoubtedly would have been issued (and) the vessel would have been seized."[17]

This court should not be "unmindful of the great importance to the owners of ships that they be not delayed in the prosecution of their business by the issuance of process, where such annoyance can be avoided without prejudice to the rights of litigants, and (it is) quite important that this court should encourage and uphold the practice of its proctors in making agreements to immediately bond vessels upon information from the proctors for libelants that a libel has been filed. Informal as this practice is, its discontinuance would impose intolerable burdens upon the business of transportation in this port."[18]

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[15] Appendix B, Item 2. Claimant-respondent did file its claim to the vessel and its answer to the libel.

[16] See *The Charles C. West*, 1931 AMC 1664 (WD N.Y.), in which the vessel was not arrested under a libel *in rem*, but a bond in lieu of arrest was filed, and the case proceeded to decree in favor of libelant. See also *The New England*, 47 F2d 291, 1931 AMC 407, 411 (SD N.Y.): "A stipulation for value is like any other contract. It is based on a consideration, the release of an arrested vessel or the undertaking not to arrest a vessel against which a claim *in rem* is pending."

[17] *The Agwisun*, 20 F2d 975, 1927 AMC 1084, 1088 (SD N.Y.): "Upon filing the libel, and pursuant to the practice which prevails among shipping interests, the process was not issued but appearances were obtained from the proctors representing the owners that a bond would be filed in the libel proceedings."

[18] *The Agwisun*, 20 F2d 975, 1927 AMC 1084, 1088 (SD N.Y.).

It is submitted that the far-reaching implications of the order of the district court in this case, warrant consideration and correction by this court on appeal.

[fol. 49] Conclusion

The order of the district judge involves a controlling question of construction of the *forum-non-conveniens* statute, a construction which, in contravention of the specific statutory requirement, attempts to confer on another district court, jurisdiction which it does not have.

Immediate appeal from this order, and authoritative determination of the issues presented thereby, will materially advance the ultimate termination of this litigation,[19] and will serve the best interests of the admiralty courts.

It is accordingly respectfully submitted that the appeal for which petitioner prays should be allowed; and that in due course, the matter should be heard as provided in the rules of this court.

Malcolm W. Monroe, Proctor for Petitioner.

Deutsch, Kerrigan & Stiles, Eberhard P. Deutsch, Of Counsel.

October, 1958.

[fol. 50] Appendix A

Forum-Non-Conveniens Statute

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or districts where it might have been brought.

28 USC 1404(a)

[19] The Interlocutory Appeals Act was passed with the view of providing for appeals "in causes relating to the transfer of the action where it is claimed that the transfer is not authorized by law," and that the court to which the cause is transferred "would have had no jurisdiction." See Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, on H. R. 6238, at p. 9; Report No. 1667 of the Committee on the Judiciary, April 29, 1958, at p. 2.

The Interlocutory Appeals Act

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 USC 1292(b)

[fol. 51] APPENDIX B

(Pertinent Parts of Record Below)

Item 1

Stipulation for Taking and Using Depositions

In Re: Sinking of Barge FBL 585 at Memphis, on November 6-7, 1957.

Stipulation

It is stipulated by and between Continental Grain Company and its underwriters, and the Federal Barge Line, Inc., and its underwriters, that the testimony taken may be used in any litigation involving any of the parties concerning the above occurrence, in any United States Court where jurisdiction may exist, to the same extent as if such litigation were now pending, and the witnesses produced by the Continental Grain Company and its underwriters.

It is further stipulated that the depositions are taken as if the Federal Rules of Civil Procedure were applicable, except that all objections, except as to the form of the

question, are reserved to the parties, and signing, sealing and filing are waived.

The cost of the taking of the depositions, including one original and one copy to each of the three interested parties, [fol. 52] will be a taxable cost if litigation ensues, otherwise, the cost will be borne one-third for each interested party.

Item 2

Letter of Undertaking

July 23, 1958

Continental Grain Company
c/o Messrs. Deutsch, Kerrigan & Stiles
1800 Hibernia Bank Building
New Orleans, Louisiana

Re: Continental Grain Company
vs Federal Barge Lines, Inc.
and Barge FBL 585
No. 3656 in Adm., E.D. La.

Gentlemen:

In consideration of your not having seized, under the *in rem* process which has been issued in the captioned action, our Barge FBL 585, which is presently tied up at our fleet in the port of New Orleans within the jurisdiction of the United States District Court for the Eastern District of Louisiana; and in further consideration of our not being required to post the usual bond for the release of that vessel,

We agree that we shall, within the delays allowed by law and/or the rules of court, file claim to Barge FBL 585, and pleadings in the above-entitled and numbered action; and that, vessel lost or not lost, we shall pay any final decree which may be rendered against said vessel in said proceeding.

[fol. 53] It is the intent of this undertaking that the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact,

been taken into custody by the United States Marshal under said *in rem* process, and released by the filing of claim and release bond, we, as claimant, reserving in behalf of the vessel all other objections and defenses otherwise available except those which might be predicated upon the fact that the vessel was not actually so seized.

Very truly yours,

FEDERAL BARGE LINES, INC.

By /s/ Noble C. Parsonage
NOBLE C. PARSONAGE
Vice President-Treasurer

Item 3

Claim

(Heading and Affidavit Omitted)

Comes now Federal Barge Lines, Inc., through its proctors of record, Lemle & Kelleher, and shows that it is the sole and only owner of the Barge FBL 585, proceeded against herein, and claims the said barge as owner and prays that it be permitted to defend according to law.

New Orleans, Louisiana, July , 1958.

/s/ Lemle & Kelleher

Proctors for Federal Barge Lines, Inc.

[fol. 54]

Item 4

Motion to Transfer Cause

(Heading Omitted)

Now comes Federal Barge Lines Inc. and move the Court for an order transferring this action to the United States District Court for the Western District of Tennessee, Western Division, on the ground that such transfer is necessary for the convenience of the parties and witnesses and in the

interest of justice as will appear from the affidavit attached hereto and made part hereof.

CHARLES KOHLMEYER, JR.
1836 National Bank of Commerce Building, New Orleans, La.

Item 5

Minute Entry, Wright, J.,

October 16, 1958

This matter came on for hearing on respondent's motion to transfer this case to the United States District Court for the Western District of Tennessee under 28 U.S.C. Sec. 1404(a).

Present: Malcolm Monroe, Esq.
Proctor for Libellant

Charles Kohlmeyer, Jr., Esq.
Proctor for Respondent

[fol. 55] The Court, having heard the argument of counsel and studied the briefs submitted in support thereof, is now ready to rule.

It Is Ordered that this case be, and the same is hereby, transferred to the United States Court for the Western District of Tennessee.

It Is Certified that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

Per Curiam

The damage to the cargo in suit occurred in Memphis when the barge into which it was being loaded at libelant's grain elevator sank. The barge, owned by respondent herein, was also damaged. That damage is the subject of a suit between these parties now pending in the Western

Division of Tennessee. Most of the witnesses to the sinking reside in Memphis. Although the case pending in Memphis will be tried to a jury, the issue therein, that is, the cause of the casualty, is precisely the issue in the case at bar. The convenience of the great majority of witnesses in this case dictates that this case be tried in Memphis. The efficient administration of justice requires that this claim for cargo damage be tried by the same court which is trying the claim [fol. 56] for hull damage, both claims being between the same parties, and relate to the same incident.[1]

The libel is in rem as to the Barge FBL-585. While this libel could have been originally brought in the Western District of Tennessee against the respondent, Federal Barge Lines, the owner of the barge, the libel as to the barge itself would ordinarily be restricted to the place where the barge is located at the time the libel is filed.[2] At that time, and now, the barge is located in this district. However, since the barge was neither seized by the Marshal nor bonded by respondent, libelant having accepted respondent's letter undertaking to respond to any decree entered herein, and since the owner thereof, Federal Barge Lines, apparently is financially able to respond to any decree rendered against it, the interest of justice would best be served by, for the reasons above stated, transferring this case to the Western District of Tennessee. Since this order to transfer does involve a serious question of law under 28 U.S.C. Sec. 1404(a), that is, the right to transfer the case as against the barge to the Western District of Tennessee,[3]

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[1] Since the suit in the Western District of Tennessee was filed before the one here, it may be that the defendant there, the libellant here, is required to counterclaim in that action for its cargo damage. See Rule 13 (a) Fed. R. Civ. P. Moreover, since the case there is to be tried on the merits on November 19, 1958, a final judgment rendered therein may bar further prosecution of the suit here under the principle of collateral estoppel. See Restatement, Judgments Sec. 58c.

[2] Clinton Foods v. United States, 4 Cir., 188 F. 2d 289; Broussard v. The Jersbek, 140 F. Supp. 851; New Jersey Barging Corp. v. T.A.D. Jones & Company, 135 F. Supp. 97; United States v. 11 Cases, etc., 94 F. Supp. 925.

[3] See Deepwater Exploration Company, et al v. Andrew Weir Insurance Co., Ltd., et al., D.C., EDLa., October 3, 1958, F. Supp. , and cases cited in No. 2.

this Court has certified this order for appeal under 28 U.S.C. Sec. 1292(b).

[fol. 57]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17499

[Title omitted]

ORDER ALLOWING APPEAL FROM INTERLOCUTORY ORDER—
November 10, 1958

Before TUTTLE, JONES and BROWN, Circuit Judges.

Per Curiam:

It appearing that application for permission to appeal from the Order of the District Court entered on October 16, 1958, has been timely made, and the Court concluding that an immediate appeal may materially advance the ultimate termination of the litigation, permission to take the appeal is hereby allowed.

[fol. 58] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—March 31, 1959 (omitted in printing).

[fol. 59]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17499

CONTINENTAL GRAIN COMPANY, Appellant,

versus

FEDERAL BARGE LINES, INC., and BARGE FBL-585, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

OPINION—June 30, 1959

Before HUTCHESON, Chief Judge, and BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge: May an *in rem* admiralty proceeding upon application of a willing Claimant be transferred under Section 1404(a), 28 USCA, to a district in which the original *res* is not located?

[fol. 60] That is the question presented by this interlocutory appeal, certified by the District Judge and subsequently accepted by us. 28 USCA §1292(b). Preliminary to the main problem we are of the view that the interlocutory appeal statute enacted by adding paragraph (b) to former 28 USCA §1292 applies to an order certified as dispositive in an admiralty cause.[1] The amendment, to be sure, refers to "a civil action." And since interlocutory appeals were allowed in admiralty from decrees determining rights and liabilities in patent suits finding infringement and certain injunctions, 28 USCA §1292(a)(3)(4)(1), it might be argued that the use of "a civil action" by Congress was a purposeful one to exclude admiralty causes already covered in part. But we see no such limited purpose. We think the term was used in the broad sense to distinguish between criminal litigation on the one hand, and all others.

[1] The new portion, found in paragraph (b), was added by 72 Stat. 1770 (September 2, 1958):

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." 28 USCA §1292(b) (1958 Supp.). For a recent discussion of this Act and its operation see Wright, The Interlocutory Appeals Act of 1958, 23 F.R.D. 199 (1959), to be reprinted in 1 Barron, Holtzoff & Wright, Federal Practice and Procedure §58.1 (1950).

This accords with the broad nature of orders encompassed [fol. 61] by the new interlocutory appeals amendment. Its own words indicate as well that it is to broaden, not restrict, appealability as it refers to "an order not otherwise appealable under this section." Unlike the former situations of decree fixing rights and liabilities in admiralty or for patent infringement, or injunction, the new act recognizes that there may be problems—perhaps of procedure, or substance, or evidence—in a given case, the decision of which, one way or the other, will effectually dispose of the litigation without the necessity of going through a trial leading to the type of orders already covered under the old Act. Congress meant to put all civil litigation, without regard to its historical divisions of law, equity, or admiralty, within reach of the new Act.

On the merits, the case may be briefly stated. On July 2, 1958, Continental Grain Company filed in the Eastern District of Louisiana a libel *in rem* against the Barge FBL-585 then in the Port of New Orleans, for damage to a cargo of soybeans resulting from the sinking of that barge in the Wolf River at Memphis, Tennessee. This was joined with an *in personam* action against Federal Barge Lines. Scarcely a week before, Federal Barge Lines, Inc. through other counsel had filed a civil suit in the Tennessee State Court against Continental Grain Company for damage sustained by Barge FBL-585 as a result of this very same sinking, allegedly caused by negligence of Continental in its loading and care of the barge. That case was removed and was pending for trial in the United States District Court for the Western District of Tennessee at Memphis. [fol. 62] The common issue in both cases, broadly stated,

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How the left hand knew nought of the right in this multi-state, multi-forum amphibious litigation is explained in the briefs. The underwriters on Federal's hull loss and cargo liability, as were those on Continental's cargo loss and its public liability, were different. Each was apparently anxious to manage its own litigation with a seeming indifference to the strong likelihood that under FR Civ.P. 13(a) concerning compulsory counterclaims, or general principles of estoppel by judgment, res judicata, or the like, trial of one case would inevitably affect, if not control, the other. See Gilmore & Black, Admiralty 507-08 (1957); and generally 1 Barron & Holtzoff, Federal Practice and Procedure §394 (1950, and Wright

was whether Barge FBL-585 sank as a result of unseaworthiness or negligent loading.

On the filing of the libel, FBL-585 was not actually seized. In accordance with the practice in New Orleans and all major seaports of maritime litigation, the usual letter of undertaking was given by Federal, providing that in consideration of the Barge not being seized and released on bond Federal would "file claim to Barge FBL-585, and pleadings" and "that, vessel lost or not lost [would] pay any final decree which may be rendered against said vessel in said proceedings." The District Court, in granting Federal's motion under Section 1404(a) to transfer the admiralty cause to Memphis because of the presence of witnesses, the convenience of parties and the pendency of the litigation there, apparently gave some significance to the fact that there had been no actual seizure of the Barge. The parties are at one that fair application of the letter under-[fol. 63] taking and particularly the Non-Waiver of Rights Clause[3] requires that we treat it as though, upon the libel being filed, the vessel had actually been seized, a Claim filed, a stipulation to abide decree[4] with sureties executed

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Supp. 1958). The Memphis case was apparently tried, but we have been kept discreetly in the dark as to its outcome. In view of our holding the Court in Tennessee may now have to deal with these problems but wholly unaffected by intimations one way or the other from us.

[3] The undertaking expressly stated that "the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in rem* process, and released by the filing of claim and release bond."

[4] Our reference to the stipulation releasing the vessel in the SS Monrosa, 5 Cir., 1958, 254 F.2d 297, AMC , cert. dismissed, 1959, U.S. , S.Ct. , 3 L.Ed.2d 723, is somewhat misleading. It is not, as some might think impliedly suggested, a consent appearance or a special agreement of the type lawyers generally refer to as a stipulation in a case. The term stipulation to abide decree is the traditional name given to what others would call a surety bond. Its name derives from the undertaking spelled out in the bond "the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of said claimant

and filed by Claimant, and the vessel formally released. Any other course would imperil the desirable avoidance of needless cost, time, and inconvenience to litigants, counsel, ships, Clerks, Marshals, Keepers and court personnel through the ready acceptance of such letter undertakings. The Agwisun, S.D.N.Y., 1927, 20 F.2d 975, 1927 AMC 1084, 1088.

Continental's opposition to the transfer is not that the admiralty nature of the proceeding somehow sets up its own moat to prevent a Section 1404 transfer. Rather its contention rests on the terms of that Section, which permit transfer "to any other district or division where it might have been brought." §1404(a).

[fol. 64] Since a libel *in rem* requires a *res* and the *res*, at the time of this libel and at the time of transfer, was in New Orleans, not Memphis, the terms of the statute were not met. And, it is further argued, the statute must be read literally since some courts have pointed out that, like a *forum non conveniens* situation, in all cases in which Section 1404 comes into play it presupposes at least two forums in which the defendant is amenable to process. See the full review of this in *Blaski* v. *Hoffman*, 7 Cir., 1958, 260 F.2d 317, now pending on certiorari, ... U.S. ....., ... S.Ct. ....., 3 L.Ed.2d 570. But we have not so read the Act. To its literal terms we have, with others, recognized what seems to be to us the obvious implication that a cause may, on proper showing, be transferred to another district to which the movant consents to an unlimited submission of the cause even though it could not have been filed there initially. Ex Parte Blaski, 5 Cir., 1957, 245 F. 2d 737.

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or its surety, execution may issue against their goods, etc." 2 Benedict, Admiralty, §§363, 368 (6th ed. 1940). Some of the various forms of the districts are set forth at 595-600. The General Admiralty Rules mention stipulations in Rules 4, 5, 11, 12, 24 and 51, 28 USCA. Gilmore & Black, Admiralty 650 (1957).

[5] The *Blaski* litigation is still on its odyssey. A patent suit was filed in the Northern District of Texas and defendant, a resident of Texas, moved for transfer to the Northern District of Illinois where the validity of the same patent was involved in extended pending litigation. We denied leave to file mandamus to prevent

Even to the most ardent admiralty purist, the result presents no real or conceptual difficulties. The Court does [fol. 65] not undertake to transfer the *res*, nor does it even attempt to transfer the cause while the *res* is still in custody of the Court. Before the transfer can be made, a Claim must have been filed and the vessel released under bond (stipulation). Once that is done, the lien on the vessel is discharged for all purposes, ceases to exist, and the release of libel bond is the sole security.[6] Traditional notions are not affected if that security floats with the cause wherever the law navigates it.

Nor does this alter in any way the characteristics of the libel *in rem*, or the historical, actual, or supposed nature of the liability of the ship as the thing. See Gilmore & Black, Admiralty 483-510 (1957). The libel begins as one *in rem*. It retains that status until the final decree, regardless of the place it pends. If as a libel *in rem* it has advantages or disadvantages, procedural or substantive, they follow the proceeding regardless of geography. And, of course, in ordering a transfer upon the application and consent of the Claimant, the "conferring" of jurisdiction upon the transferee court over a cause which would never have come its way had it been essential that the vessel be within its territory is no different than the time-honored practice in the initial

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the transfer. Ex Parte Blaski, 5 Cir., 1957, 245 F.2d 737. When it got to Chicago, the District Judge accepted it, although reluctantly. The Court of Appeals for the Seventh Circuit, after first approving the transfer, later changed its views and granted mandamus to prevent the Judge accepting the transfer ordered out of this Circuit. Blaski v. Hoffman, 7 Cir., 1958, 260 F.2d 347. Like the man without a country, this litigation has been expatriated from Texas; it has been denied admission to Illinois. To solve this impasse was presumably what led the Court to grant certiorari, ... U.S. ....., ... S.Ct. ....., 3 L.Ed.2d 570. That decision could, of course, undo our action.

[6] See Judge Woolsey's full discussion of this in The New England (J. K. Welding Co. v. Gotham Marine Corp.) S.D.N.Y., 1931, 47 F.2d 332, 1931 AMC 407: "The stipulation for value is a complete substitute for the res, and the stipulation for value alone is sufficient to give jurisdiction to a court because its legal effect is the same as the presence of the res in the court's custody • • •." 47 F.2d at 335. See also Gilmore & Black, Admiralty 650-51 (1957).

filing of libels *in rem*. The subject matter being within the Court's jurisdiction, the parties and the cause being real and justiciable, a party or thing may submit to a particular [fol. 66] court. And whether thought of in terms of waiver or consent, it is, as every proctor knows, done on a very large scale. 2 Benedict, Admiralty 78 (6th ed. 1940); The Providence, D.R.I., 1923, 293 Fed. 595; The New England, see note 6, *supra;* and Yozgat (*P. Diacon-Zadeh* v. *Devlet Denizyollari*), E.D.Pa., 1954, 127 F.Supp. 446, 1954 AMC 2146.

We are not dealing with a coercive transfer, neither sought nor consented to by the Claimant. *Broussard* v. *The Jersbek*, S.D.N.Y., 1956, 140 F.Supp. 851, 1956 AMC 1575. We deal here only with a voluntary request seeking and consenting to the transfer. We join others in recognizing that this may be done. *Torres* v. *Walsh*, 2 Cir., 1955, 221 F.2d 319, 1955 AMC 1181, cert. denied, 350 U.S. 836, 76 S.Ct. 72, 100 L.Ed. 746; *Andino* v. *The S.S. Claiborne*, S.D. N.Y., 1957, 148 F.Supp. 701, 1957 AMC 526; *May* v. *The Steel Navigator*, S.D.N.Y., 1957, 152 F.Supp. 254, 1957 AMC 1832.

As we find the transfer within the power of the District Court, we need only state as to the propriety of the exercise of that power that we find no basis for concluding that the Judge abused his discretion. The rule announced in Ex Parte Charles Pfizer & Co., 5 Cir., 1955, 225 F.2d 720, is applicable and controlling.

Affirmed.

[fol. 67]

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CONTINENTAL GRAIN COMPANY,

No. 17499. versus

FEDERAL BARGE LINES, INC., and BARGE FBL-585.

JUDGMENT—June 30, 1959

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[fol. 68]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 17,499

[Title omitted]

MOTION FOR STAY OF MANDATE—Filed July 6, 1959

On suggesting to the court that appellant intends seasonably to seek certiorari from the Supreme Court of the United States herein, appellant respectfully moves the court to stay issuance of its mandate herein for sixty days pending application for, and thereafter disposition of the petition for, certiorari.

Malcolm W. Monroe of Deutsch, Kerrigan & Stiles,
Proctor for Appellant.

New Orleans, July 6, 1959.

Certificate of Service (omitted in printing).

[fol. 69]

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17,499

[Title omitted]

ORDER STAYING MANDATE—July 9, 1959

On Consideration of the Application of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of 60 days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within 60 days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 60 days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 9th day of July, 1959.

John R. Brown, United States Circuit Judge.

[fol. 70] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 71]

SUPREME COURT OF THE UNITED STATES

No. 229, October Term, 1959

CONTINENTAL GRAIN COMPANY, Petitioner,

vs.

BARGE FBL-585, et al.

ORDER ALLOWING CERTIORARI—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is transferred to the summary calendar and set for argument immediately following No. 26.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1959

No. 229

CONTINENTAL GRAIN COMPANY,
Petitioner

versus

BARGE FBL-585
and
FEDERAL BARGE LINES, INC.,
Respondents

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Eberhard P. Deutsch,
Hibernia Bank Building,
New Orleans 12, Louisiana,
Attorney for Petitioner

Deutsch, Kerrigan & Stiles,
Malcolm W. Monroe,
René H. Himel, Jr.,
Of Counsel

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SUPREME COURT OF THE UNITED STATES

October Term, 1959

No.

CONTINENTAL GRAIN COMPANY,
Petitioner

versus

BARGE FBL-585
and
FEDERAL BARGE LINES, INC.,
Respondents

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner seeks *certiorari* to review a judgment of the Court of Appeals for the Fifth Circuit, and, in support of its petition, shows:

OPINIONS BELOW AND JURISDICTION

Neither the opinion of the District Court, nor that of the Court of Appeals, has yet been reported. Both opinions are printed in the appendix hereto.

The Court of Appeals rendered its judgment on June 30, 1959. The mandate of the Court of Appeals has been stayed pending disposition of the case by this court.

Jurisdiction of this court lies under 28 USC 1254.

QUESTION PRESENTED

The novel and important question of federal statutory construction presented for review is:

> Does 28 USC 1404a, which permits a district court to "transfer any civil action to any other district . . . where it might have been brought", authorize transfer of an admiralty action *in rem*, to a district in which the action could not have been brought—at least without the consent of both parties—because the *res* has never been located in that district?

The affirmative holding by the Court of Appeals in this case is the first appellate decision directly in point; but this holding is in direct conflict with a decision of the United States District Court for the Southern District of New York, that an admiralty action *in rem* may not be transferred to a district in which the *res* is not located. *Broussard vs The Jersbek*, 140 FS 851 (1956).

It is also in conflict with a dictum of the Court of Appeals for the Second Circuit which, while upholding transfer of an admiralty action *in rem* to a court which had jurisdiction of the *res*, stated that "it is probable that we would hold that the transfer of an in rem ad-

miralty case to a court having no jurisdiction or power over the res was unauthorized". *Torres vs Walsh*, 221 F2d 319, 321 (1955).

The holding below also conflicts in principle with decisions by the Court of Appeals for the Fourth Circuit and by the United States District Court for the District of Oregon, that a proceeding *in rem* for condemnation of food or drugs may not be transferred to a district in which the *res* is not located. *Clinton Foods vs United States*, 188 F2d 289 (CA-1951); *United States vs 11 Cases*, 94 FS 925 (DC Ore.-1950).

The question at issue in this case is closely related to that under consideration in *Hoffman vs Blaski*, now pending in this court (No. 597, October Term, 1958), disposition of which, as the Court of Appeals recognized, "could, of course, undo our action" in this case. See page 18, *post*.

STATUTE INVOLVED

28 USC 1404a: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE

This is an admiralty action for damage to cargo on a barge which sank in 1957 in Wolf River at Memphis. The action is *in rem* against the barge, and *in personam* against the barge's owner.

Shortly after her sinking, the barge was raised and moved to the port of New Orleans.

At the time of the filing of the libel and of the motion to transfer, the vessel was, and still is, within the Eastern District of Louisiana, and subject to jurisdiction *in rem* only within that district.

After the libel was filed, the barge's owner issued to petitioner its letter of undertaking: "In consideration of (petitioner) not having seized, under the *in rem* process which has been issued in the captioned action, our Barge *FBL-585*, which is presently tied up at our fleet in the port of New Orleans within the jurisdiction of the United States District Court for the Eastern District of Louisiana, and in further consideration of our not being required to post the usual bond for the release of that vessel", the owner agreed that it would "file claim to Barge *FBL-585*, and pleadings", and "that, vessel lost or not lost, (it would) pay any final decree which may be rendered against said vessel in said proceeding".[1]

The undertaking further stipulated that "the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal (for the Eastern District of Louisiana) under said *in rem* process, and released by the filing of claim and release bond".

[1] The undertaking is printed in the Appendix at pages 21-22, *post*.

The barge owner then appeared in the proceeding in the Eastern District of Louisiana, and filed claim to the barge, and its answer.

Next, the owner filed a motion to transfer the action from the Eastern District of Louisiana to the Western District of Tennessee, where it had instituted a civil action against petitioner for the damage sustained by the barge as a result of the sinking, alleged to have been caused by petitioner's fault in loading the barge.

In granting the motion to transfer, the district court held that "although the case pending in Memphis will be tried to a jury, the issue therein, that is, the cause of the casualty, is precisely the issue in the case at bar"; and that "the efficient administration of justice requires that this claim for cargo damage be tried by the same court which is trying the claim for hull damage, both claims being between the same parties, and relate to the same incident".[2]

[2] The district court also suggested that "since the suit in the Western District of Tennessee was filed before the one here, it may be that the defendant there, the libelant here, is required [under Rule 13(a), Fed. R. Civ. P.] to counterclaim in that action for its cargo damage". But the barge was not a party to the Tennessee proceedings, and accordingly not subject to counterclaim. Further, Rule 82 of the Federal Rules of Civil Procedure provides that the Rules shall not be construed to extend the jurisdiction of the district courts; and since the federal court, on its civil side, could have no jurisdiction over an admiralty action *in rem*, petitioner could not have filed a "third-party" action *in rem* in the civil action in Tennessee, where the barge was not to be found in any event. See *Noma Electric Corp. vs Polaroid Corp.*, 2 FRD 454 (SD NY-1942); *Milburn vs Proctor Trust Co.*, 54 FS 989 (WD La.-1944).

As to the *in-rem* action, the district court held that "since the barge was neither seized by the Marshal nor bonded by respondent, libelant having accepted respondent's letter undertaking to respond to any decree entered herein, and since the owner thereof, Federal Barge Lines, apparently is financially able to respond to any decree rendered against it, the interest of justice would best be served by, for the reasons above stated, transferring this case to the Western District of Tennessee".

On appeal under the Interlocutory Appeals Act, the transfer order was affirmed by the Court of Appeals, which conceded that the letter of undertaking requires the action to be treated in all respects as an action *in rem;* but the Court of Appeals held that an *in-rem* action may be transferred to a district "to which the movant consents to an unlimited submission of the cause", despite the fact that the *res* was not located in that district at the time of filing the libel nor at any time thereafter.

ARGUMENT

28 USC 1404a provides affirmatively that an action may be transferred only to another district in which "it might have been brought".

As pointed out by the Court of Appeals for the Fourth Circuit, "it is well settled that a proceeding in rem against specific property is local in character and must be brought where the property is subject to seizure under process of the court".

That court further held that since the condemnation proceeding involved in that case "could not have been brought in any other district than that in which (the *res* was) seized," it is clear that it may not be transferred from that district under the provisions of 28 USCA Sec. 1404(a)".[3]

The same conclusion was reached in an admiralty action *in rem* by the United States District Court for the Southern District of New York in *Broussard vs The Jersbek*, 140 FS 851 (1956); and the holding in *Broussard* is supported by a dictum of the Court of Appeals for the Second Circuit (quoted, under *Question Presented*, above) in *Torres vs Walsh*, 221 F2d 319, 321 (1955).

In reaching the opposite conclusion in this case, the Court of Appeals for the Fifth Circuit, while acknowledging that the action is *in rem*, refused to follow these direct precedents, and based its contrary decision on its prior holding (now before this court for review) that a transitory action *in personam* may, on the defendant's motion, be transferred to a district in which venue could not have been laid without the defendant's consent.[4]

[3] *Clinton Foods vs United States*, 188 F2d 289, 292 (1951). Accord: *United States vs 11 Cases*, 94 FS 925 (DC Ore.-1950).

[4] Cf. the companion cases of *Ex parte Blaski*, 245 F2d 737 (CA 6-1957), and *Blaski vs Hoffman*, 260 F2d 317 (CA 7-1958), *certiorari* granted, 359 US 904. The Court of Appeals also cited *Andino vs The SS Claiborne*, 148 FS 701 (SD N.Y.-1957), and *May vs The Steel Navigator*, 152 FS 254 (SD N.Y.-1957), as authority for transfer of an *in-rem* proceeding to a district in which the *res* could not have been found; but in each case the vessel, while named in the title of the proceeding, was apparently not seized, nor a letter of un-

Here the question is whether an action *in rem* may be transferred to a court which had no jurisdiction of the *res*, and in which, accordingly, the action "might (not) have been brought"—at the very least in the absence of the consent of both parties.[5]

The district court cases of *The Providence*, 293 Fed. 595 (D R.I.-1923) and *The Yozgat*, 127 FS 446 (ED Pa.-1954), cited by the Court of Appeals for the proposition that a "thing may submit to a particular court", do not support the court's affirmative answer to the foregoing question.

In each of the cited cases, both libelant and claimant agreed to confer jurisdiction *in rem* on the court.[6]

It is petitioner's position that a libelant may not be compelled to litigate an action *in rem* before a court having no jurisdiction of the *res*, by the simple device of an agreement by the owner of the *res* to file a bond with that court.

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dertaking given, to perfect *in rem* jurisdiction. Thus, the orders of transfer could have referred only to the *in-personam* action, and those cases stand on equal footing with *Ex parte Blaski*.

[5] It seems doubtful whether, in any event, jurisdiction *in rem* can be conferred, even by consent of the parties, on a court having no jurisdiction of the *res;* but discussion of that question may be pretermitted for present purposes.

[6] Nor is the decision of the District Court for the Southern District of New York in *The New England*, 47 F2d 332 (1931), also cited by the Court of Appeals, in point here. In that case, the vessel was in fact seized and released upon claimant's filing a stipulation for value, and the only question before the court was whether libelant could recover in that proceeding a sum greater than the amount of the security substituted for the *res*.

Since it is obvious that this action *in rem* "might (not) have been brought" initially in the Western District of Tennessee, at least without the consent of libelant as well as of claimant, the action cannot be transferred to that district under 28 USC 1404a upon the consent of claimant alone—that consent not being sufficient to confer jurisdiction *in rem* on that court.

The decision below, sustaining such a transfer despite the plain statutory restriction of transfers to a district in which the action "might have been brought", is in direct conflict with the holding of the United States District Court for the Southern District of New York in *Broussard vs The Jersbek*, 140 FS 851, which is supported by the *dictum* of the Court of Appeals for the Second Circuit in *Torres vs Walsh*, 221 F2d 319, 321.

The decision below is also contrary in essence to the decisions of the Court of Appeals for the Fourth Circuit in *Clinton Foods vs United States*, 188 F2d 289, and of the United States District Court for the District of Oregon in *United States vs 11 Cases*, 94 FS 925.

Pendency, on this court's docket, of *Hoffman vs Blaski* (No. 597, October Term, 1958), affords this court the opportunity, by granting *certiorari* in this case, to decide simultaneously two important related questions arising under the statutory provision at issue.[7]

[7] The Court of Appeals recognized, in its opinion in this case, that this court's disposition of *Hoffman vs Blaski* "could, of course, undo our action". See page 18, *post*.

For these reasons, it is respectfully submitted that the writ applied for should issue.

Eberhard P. Deutsch,
Attorney for Petitioner

Deutsch, Kerrigan & Stiles,
Malcolm W. Monroe,
René H. Himel, Jr.,
Of Counsel

July, 1959

APPENDIX

ORDER AND OPINION OF THE DISTRICT COURT

This matter came on for hearing on respondent's motion to transfer this case to the United States District Court for the Western District of Tennessee under 28 U.S.C. § 1404(a).

Present: Malcolm Monroe, Esq.
Proctor for Libellant
Charles Kohlmeyer, Jr., Esq.
Proctor for Respondent

The court, having heard the argument of counsel and studied the briefs submitted in support thereof, is now ready to rule.

IT IS ORDERED that this case be, and the same is hereby, transferred to the United States Court for the Western District of Tennessee.

IT IS CERTIFIED that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

PER CURIAM

The damage to the cargo in suit occurred in Memphis when the barge into which it was being loaded at libellant's grain elevator sank. The barge, owned by re-

spondent herein, was also damaged. That damage is the subject of a suit between these parties now pending in the Western District of Tennessee. Most of the witnesses to the sinking reside in Memphis. Although the case pending in Memphis will be tried to a jury, the issue therein, that is, the cause of the casualty, is precisely the issue in the case at bar. The convenience of the great majority of witnesses in this case dictates that this case be tried in Memphis. The efficient administration of justice requires that this claim for cargo damage be tried by the same court which is trying the claim for hull damage, both claims being between the same parties, and relate to the same incident.[1]

The libel is in rem as to the Barge FBL-585. While this libel could have been originally brought in the Western District of Tennessee against the respondent, Federal Barge Lines, the owner of the barge, the libel as to the barge itself would ordinarily be restricted to the place where the barge is located at the time the libel is filed.[2] At that time, and now, the barge is

[1] Since the suit in the Western District of Tennessee was filed before the one here, it may be that the defendant there, the libellant here, is required to counterclaim in that action for its cargo damage. See Rule 13 (a) Fed. R. Civ. P. Moreover, since the case there is to be tried on the merits on November 19, 1958, a final judgment rendered therein may bar further prosecution of the suit here under the principle of collateral estoppel. See Restatement, Judgments § 58c.

[2] *Clinton Foods v. United States*, 4 Cir., 188 F.2d 289; *Broussard v. The Jersbek*, 140 F. Supp. 851; *New Jersey Barging Corp. v. T.A.D. Jones & Company*, 135 F. Supp. 97; *United States v. 11 Cases, etc.*, 94 F. Supp. 925.

located in this district. However, since the barge was neither seized by the Marshal nor bonded by respondent, libellant having accepted respondent's letter undertaking to respond to any decree entered herein, and since the owner thereof, Federal Barge Lines, apparently is financially able to respond to any decree rendered against it, the interest of justice would best be served by, for the reasons above stated, transferring this case to the Western District of Tennessee. Since this order to transfer does involve a serious question of law under 28 U.S.C. § 1404(a), that is, the right to transfer the case as against the barge to the Western District of Tennessee,[3] this Court has certified this order for appeal under 28 U.S.C. § 1292(b).

OPINION OF THE COURT OF APPEALS

BROWN, Circuit Judge: May an *in rem* admiralty proceeding upon application of a willing Claimant be transferred under Section 1404(a), 28 USCA, to a district in which the original *res* is not located?

That is the question presented by this interlocutory appeal, certified by the District Judge and subsequently accepted by us. 28 USCA §1292(b). Preliminary to the main problem we are of the view that the interlocutory appeal statute enacted by adding paragraph (b) to former 28 USCA §1292 applies to an order certified as

[3] See *Deepwater Exploration Company, et al v. Andrew Weir Insurance Co., Ltd., et al*, D.C., ED La., October 3, 1958, ... F. Supp. ....., and cases cited in Note 2.

dispositive in an admiralty cause.[1] The amendment, to be sure, refers to "a civil action." And since interlocutory appeals were allowed in admiralty from decrees determining rights and liabilities in patent suits finding infringement and certain injunctions, 28 USCA §1292(a)(3)(4)(1), it might be argued that the use of "a civil action" by Congress was a purposeful one to exclude admiralty causes already covered in part. But we see no such limited purpose. We think the term was used in the broad sense to distinguish between criminal litigation, on the one hand, and all others. This accords with the broad nature of orders encompassed by the new interlocutory appeals amendment. Its own words indicate as well that it is to broaden, not restrict, appealability as it refers to "an order not otherwise appealable under this section." Unlike the former situations of decree fixing rights and liabilities in admiralty or for patent infringement, or injunction, the new act recognizes that there may be problems—perhaps of procedure, or sub-

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[1] The new portion, found in paragraph (b), was added by 72 Stat. 1770 (September 2, 1958):

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." 28 USCA §1292(b) (1958 Supp.). For a recent discussion of this Act and its operation see Wright, The Interlocutory Appeals Act of 1958, 23 F.R.D. 199 (1959), to be reprinted in 1 Barron, Holtzoff & Wright, Federal Practice and Procedure §58.1 (1950).

stance, or evidence—in a given case, the decision of which, one way or the other, will effectually dispose of the litigation without the necessity of going through a trial leading to the type of orders already covered under the old Act. Congress meant to put all civil litigation, without regard to its historical divisions of law, equity, or admiralty, within reach of the new Act.

On the merits, the case may be briefly stated. On July 2, 1958, Continental Grain Company filed in the Eastern District of Louisiana a libel *in rem* against the Barge FBL-585 then in the Port of New Orleans, for damage to a cargo of soybeans resulting from the sinking of that barge in the Wolf River at Memphis, Tennessee. This was joined with an *in personam* action against Federal Barge Lines. Scarcely a week before, Federal Barge Lines, Inc. through other counsel had filed a civil suit in the Tennessee State Court against Continental Grain Company for damage sustained by Barge FBL-585 as a result of this very same sinking, allegedly caused by negligence of Continental in its loading and care of the barge. That case was removed and was pending for trial in the United States District Court for the Western District of Tennessee at Memphis. The common issue in both cases,[2]

[2] How the left hand knew nought of the right in this multi-state, multi-forum amphibious litigation is explained in the briefs. The underwriters on Federal's hull loss and cargo liability, as were those on Continental's cargo loss and its public liability, were different. Each was apparently anxious to manage its own litigation with a seeming indifference to the strong likelihood that under FRCiv.P. 13(a) concerning compulsory counterclaims, or general principles of estoppel by judgment, res judicata, or the like, trial of one case would inevitably affect, if not control, the other. See Gilmore & Black, Admiralty 507-08 (1957), and generally 1 Barron & Holtzoff, Federal Practice and Procedure §394 (1950, and Wright Supp. 1958). The Memphis case was

broadly stated, was whether Barge FBL-585 sank as a result of unseaworthiness or negligent loading.

On the filing of the libel, FBL-585 was not actually seized. In accordance with the practice in New Orleans and all major seaports of maritime litigation, the usual letter of undertaking was given by Federal, providing that in consideration of the Barge not being seized and released on bond Federal would "file claim to Barge FBL-585, and pleadings" and "that, vessel lost or not lost [would] pay any final decree which may be rendered against said vessel in said proceedings." The District Court, in granting Federal's motion under Section 1404(a) to transfer the admiralty cause to Memphis because of the presence of witnesses, the convenience of parties and the pendency of the litigation there, apparently gave some significance to the fact that there had been no actual seizure of the Barge. The parties are at one that fair application of the letter undertaking and particularly the Non-Waiver of Rights Clause[3] requires that we treat it as though, upon the libel being filed, the vessel had actually been seized, a Claim filed, a stipulation to abide decree[4] with sureties executed and filed by Claimant, and

apparently tried, but we have been kept discretely in the dark as to its outcome. In view of our holding the Court in Tennessee may now have to deal with these problems but wholly unaffected by intimations one way or the other from us.

[3] The undertaking expressly stated that "the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in rem* process, and released by the filing of claim and release bond."

[4] Our reference to the stipulation releasing the vessel in the SS Monrosa, 5 Cir., 1958, 254 F.2d 297, ...AMC....,

the vessel formally released. Any other course would imperil the desirable avoidance of needless cost, time, and inconvenience to litigants, counsel, ships, Clerks, Marshals, Keepers and court personnel through the ready acceptance of such letter undertakings. The Agwisun, S.D.N.Y., 1927, 20 F.2d 975, 1927 AMC 1084, 1088.

Continental's opposition to the transfer is not that the admiralty nature of the proceeding somehow sets up its own moat to prevent a Section 1404 transfer. Rather its contention rests on the terms of that Section, which permit transfer "to any other district or division where it might have been brought." §1404(a).

Since a libel *in rem* requires a *res* and the *res*, at the time of this libel and at the time of transfer, was in New Orleans, not Memphis, the terms of the statute were not met. And, it is further argued, the statute must be read literally since some courts have pointed out that, like a *forum non conveniens* situation, in all cases in which Section 1404 comes into play it presupposes at least two forums in which the defendant is amenable to process. See the full review of this in *Blaski v. Hoffman*, 7 Cir.,

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cert. dismissed, 1959, ...U.S....., ...S.Ct....., 3 L.Ed.2d 723, is somewhat misleading. It is not, as some might think impliedly suggested, a consent appearance or a special agreement of the type lawyers generally refer to as a stipulation in a case. The term stipulation to abide decree is the traditional name given to what others would call a surety bond. Its name derives from the undertaking spelled out in the bond "the parties hereto hereby consenting and agreeing, that in case of default or contumacy on the part of said claimant or its surety, execution may issue against their goods, etc." 2 Benedict, Admiralty, §§363, 368 (6th ed. 1940). Some of the various forms of the districts are set forth at 595-600. The General Admiralty Rules mention stipulations in Rules 4, 5, 11, 12, 24 and 51, 28 USCA. Gilmore & Black, Admiralty 650 (1957).

1958, 260 F.2d 317, now pending on certiorari, ...U.S. ...., ...S.Ct....., 3 L.Ed.2d 570. But we have not so read the Act. To its literal terms we have, with others, recognized what seems to be to us the obvious implication that a cause may, on proper showing, be transferred to another district to which the movant consents to an unlimited submission of the cause even though it could not have been filed there initially. Ex Parte Blaski,[5] 5 Cir., 1957, 245 F.2d 737.

Even to the most ardent admiralty purist, the result presents no real or conceptual difficulties. The Court does not undertake to transfer the *res*, nor does it even attempt to transfer the cause while the *res* is still in custody of the Court. Before the transfer can be made, a Claim must have been filed and the vessel released under bond (stipulation). Once that is done, the lien on the vessel is discharged for all purposes, ceases to exist, and the release of libel bond is the sole security.[6]

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[5] The *Blaski* litigation is still on its odyssey. A patent suit was filed in the Northern District of Texas and defendant, a resident of Texas, moved for transfer to the Northern District of Illinois where the validity of the same patent was involved in extended pending litigation. We denied leave to file mandamus to prevent the transfer. Ex Parte Blaski, 5 Cir., 1957, 245 F.2d 737. When it got to Chicago, the District Judge accepted it, although reluctantly. The Court of Appeals for the Seventh Circuit, after first approving the transfer, later changed its views and granted mandamus to prevent the Judge accepting the transfer ordered out of this Circuit. Blaski v. Hoffman, 7 Cir., 1958, 260 F.2d 317. Like the man without a country, this litigation has been expatriated from Texas; it has been denied admission to Illinois. To solve this impasse was presumably what led the Court to grant certiorari, ...U.S....., ...S. Ct....., 3 L.Ed.2d 570. That decision could, of course, undo our action.

[6] See Judge Woolsey's full discussion of this in The New England (J. K. Welding Co. v. Gotham Marine Corp.) S.D.N.Y., 1931, 47 F.2d 332, 1931 AMC 407: "The stipulation

Traditional notions are not affected if that security floats with the cause wherever the law navigates it.

Nor does this alter in any way the characteristics of the libel *in rem*, or the historical, actual, or supposed nature of the liability of the ship as the thing. See Gilmore & Black, Admiralty 483-510 (1957). The libel begins as one *in rem*. It retains that status until the final decree, regardless of the place it pends. If as a libel *in rem* it has advantages or disadvantages, procedural or substantive, they follow the proceeding regardless of geography. And, of course, in ordering a transfer upon the application and consent of the Claimant, the "conferring" of jurisdiction upon the transferee court over a cause which would never have come its way had it been essential that the vessel be within its territory is no different than the time-honored practice in the initial filing of libels *in rem*. The subject matter being within the Court's jurisdiction, the parties and the cause being real and justiciable, a party or thing may submit to a particular court. And whether thought of in terms of waiver or consent, it is, as every proctor knows, done on a very large scale. 2 Benedict, Admiralty 78 (6th ed. 1940); The Providence, D.R.I., 1923, 293 Fed. 595; The New England, see note 6, *supra*; and Yozgat (*P. Diacon-Zadeh v. Devlet Denizyollari*), E.D.Pa., 1954, 127 F.Supp. 446, 1954 AMC 2146.

We are not dealing with a coercive transfer, neither sought nor consented to by the Claimant. *Broussard v.*

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for value is a complete substitute for the res, and the stipulation for value alone is sufficient to give jurisdiction to a court because its legal effect is the same as the presence of the res in the court's custody * * *." 47 F.2d at 335. See also Gilmore & Black, Admiralty 650-51 (1957).

The Jersbek, S.D.N.Y., 1956, 140 F.Supp. 851, 1956 AMC 1575. We deal here only with a voluntary request seeking and consenting to the transfer. We join others in recognizing that this may be done. *Torres v. Walsh*, 2 Cir., 1955, 221 F.2d 319, 1955 AMC 1181, cert. denied, 350 U.S. 836, 76 S.Ct. 72, 100 L.Ed. 746; *Andino v. The S.S. Claiborne*, S.D.N.Y., 1957, 148 F.Supp. 701, 1957 AMC 526; *May v. The Steel Navigator*, S.D.N.Y., 1957, 152 F.Supp. 254, 1957 AMC 1832.

As we find the transfer within the power of the District Court, we need only state as to the propriety of the exercise of that power that we find no basis for concluding that the Judge abused his discretion. The rule announced in Ex Parte Charles Pfizer & Co., 5 Cir., 1955, 225 F.2d 720, is applicable and controlling.

AFFIRMED.

JUDGMENT OF THE COURT OF APPEALS

Extract From the Minutes of June 30, 1959.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

LETTER OF UNDERTAKING

July 23, 1958

Continental Grain Company
c/o Messrs. Deutsch, Kerrigan & Stiles
1800 Hibernia Bank Building
New Orleans, Louisiana

Re: Continental Grain Company
vs Federal Barge Lines, Inc.
and Barge FBL 585
No. 3656 in Adm., E.D. La.

Gentlemen:

In consideration of your not having seized, under the *in rem* process which has been issued in the captioned action, our Barge *FBL 585*, which is presently tied up at our fleet in the port of New Orleans within the jurisdiction of the United States District Court for the Eastern District of Louisiana; and in further consideration of our not being required to post the usual bond for the release of that vessel,

We agree that we shall, within the delays allowed by law, and/or the rules of court, file claim to Barge *FBL 585*, and pleadings in the above-entitled and numbered action; and that, vessel lost or not lost, we shall pay any final decree which may be rendered against said vessel in said proceeding.

It is the intent of this undertaking that the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in rem* process, and released by the filing of claim and release bond, we, as claimant, reserving in behalf of the vessel all other objections and defenses otherwise available except those which might be predicated upon the fact that the vessel was not actually so seized.

Very truly yours,
FEDERAL BARGE LINES, INC.
By /s/ Noble C. Parsonage
NOBLE C. PARSONAGE
Vice President-Treasurer

Supreme Court of the United States

October Term, 1959

No. 229

CONTINENTAL GRAIN COMPANY,
Petitioner

versus

BARGE FBL-585
and
FEDERAL BARGE LINES, INC.,
Respondents

BRIEF FOR PETITIONER

Eberhard P. Deutsch,
Hibernia Bank Building,
New Orleans 12, Louisiana,
Attorney for Petitioner

Deutsch, Kerrigan & Stiles,
Malcolm W. Monroe,
René H. Himel, Jr.,
Of Counsel.

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TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 229

CONTINENTAL GRAIN COMPANY,
Petitioner

versus

BARGE FBL-585
and
FEDERAL BARGE LINES, INC.,
Respondents

BRIEF FOR PETITIONER

OPINIONS BELOW and JURISDICTION

The opinion of the District Court has not been reported. That of the Court of Appeals is reported at 268 F2d 240.

The Court of Appeals rendered its judgment on June 30, 1959. The petition for *certiorari* was filed on July

20, 1959, and was granted on October 12, 1959 (R 50). The mandate of the Court of Appeals has been stayed pending disposition of the case by this court (R 49).

Jurisdiction of this court lies under 28 USC 1254.

STATUTE INVOLVED

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Act of June 25, 1948, chapter 646, 62 Stat. 937, 28 USC 1404a.

QUESTION PRESENTED

Does 28 USC 1404a, which permits a district court to "transfer any civil action to any other district . . . where it might have been brought", authorize transfer of an admiralty action *in rem*, to a district in which the action could not have been brought—at least without the consent of both parties—because the *res* has never been located in that district?

STATEMENT OF THE CASE

This is an admiralty action for damage to cargo on a barge which sank in 1957 in Wolf River at Memphis. The action is *in rem* against the barge, and *in personam* against the barge's owner (R 2-5).

Shortly after her sinking, the barge was raised and moved to the port of New Orleans (R 12).

At the time of the filing of the libel, and of the motion to transfer, the vessel was, and still is, within the Eastern District of Louisiana, subject to jurisdiction only within that district (R 13).

After the libel was filed, the barge's owner issued to petitioner its letter of undertaking: "In consideration of (petitioner) not having seized, under the *in rem* process which has been issued in the captioned action, our Barge *FBL-585*, which is presently tied up at our fleet in the port of New Orleans within the jurisdiction of the United States District Court for the Eastern District of Louisiana; and in further consideration of our not being required to post the usual bond for the release of that vessel", the owner agreed that it would "file claim to Barge *FBL-585*, and pleadings", and "that, vessel lost or not lost, (it would) pay any final decree which may be rendered against said vessel in said proceeding" (R 16).[1]

The undertaking further stipulated that "the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal (for the Eastern District of Louisiana) under said *in rem* process, and released by the filing of claim and release bond" (R 16-17).

The barge owner then appeared in the proceeding in the Eastern District of Louisiana, and filed claim to the barge, and its answer (R 6, 7).

[1] The undertaking is printed in full in the Appendix at pages 13-14, *post*.

Next, the owner filed a motion to transfer the action from the Eastern District of Louisiana to the Western District of Tennessee, where it had instituted a civil action against petitioner for damage sustained by the barge as a result of the sinking, alleged to have been caused by petitioner's fault (R 9).

In granting the motion to transfer, the District Court held that "although the case pending in Memphis will be tried by a jury, the issue therein, that is, the cause of the casualty, is precisely the issue in the case at bar"; and that "the efficient administration of justice requires that this claim for cargo damage be tried by the same court which is trying the claim for hull damage, both claims being between the same parties, and relate to the same incident" (R 18-19).[2]

As to the *in-rem* action, the district court held that "since the barge was neither seized by the Marshal nor bonded by respondent, libelant having accepted respondent's letter undertaking to respond to any decree entered herein, and since the owner thereof, Federal

[2] The district court also suggested that "since the suit in the Western District of Tennessee was filed before the one here, it may be that the defendant there, the libelant here, is required [under Rule 13(a), Fed. R. Civ. P.] to counterclaim in that action for its cargo damage". R 19. But the barge was not a party to the Tennessee proceeding, and accordingly not subject to counterclaim. Further, Rule 82 of the Federal Rules of Civil Procedure provides that the Rules shall not be construed to extend the jurisdiction of the district courts; and since the federal court, on its civil side, could have no jurisdiction over an admiralty action *in rem*, petitioner could not have filed a "third-party" action *in rem* in the civil action in Tennessee, where the barge was not to be found in any event. See *Noma Electric Corp. vs Polaroid Corp.*, 2 FRD 454 (SD NY-1942); *Milburn vs Proctor Trust Co.*, 54 FS 989 (WD La.-1944).

Barge Lines, apparently is financially able to respond to any decree rendered against it, the interest of justice would best be served by, for the reasons above stated, transferring this case to the Western District of Tennessee" (R 19).

On appeal under the Interlocutory Appeals Act, the transfer order was affirmed by the Court of Appeals, which conceded that the letter of undertaking requires the action to be treated in all respects as an action *in rem;* but the Court of Appeals held that an *in-rem* action may be transferred to a district "to which the movant consents to an unlimited submission of the cause", despite the fact that the *res* was not located in that district at the time of filing the libel, nor at any time thereafter.

Meanwhile, the action between petitioner and respondent in Tennessee had been concluded, which largely obviates the considerations which impelled the transfer order.

ARGUMENT

This case is to be argued following *Hoffman vs Blaski*, No. 25, and *Sullivan vs Behimer*, No. 26, which involve the related question whether an action *in personam* may be transferred to a court which has no personal jurisdiction over the defendant, except by waiver.

28 USC 1404a provides affirmatively and expressly that an action may be transferred only to another district in which "it might have been brought".

Whatever the broad connotations of the quoted phrase may be, it would appear to denote at least a district court which has jurisdiction over the action sought to be transferred.

As pointed out by the Court of Appeals for the Fourth Circuit, "it is well settled that a proceeding in rem against specific property is local in character and must be brought where the property is subject to seizure under process of the court".

That court further held that since the condemnation proceeding involved in that case "could not have been brought in any other district than that in which (the *res* was) seized, it is clear that it may not be transferred from that district under the provisions of 28 USC Sec. 1404(a)".[3]

The same conclusion was reached in an admiralty action *in rem* by the United States District Court for the Southern District of New York in *Broussard vs The Jersbek*, 140 FS 851 (1956); and the holding in *Broussard* is supported by a dictum of the Court of Appeals for the Second Circuit which, while upholding transfer of an admiralty action *in rem*, to a court which had jurisdiction of the *res*, stated that "it is probable that we would hold that the transfer of an in rem admiralty case to a court having no jurisdiction or power over the res was unauthorized". *Torres vs Walsh*, 221 F2d 319, 321 (1955).

[3] *Clinton Foods vs United States*, 188 F2d 289, 292 (1951). Accord: *United States vs 11 Cases*, 94 FS 925 (DC Ore.-1950).

In reaching the opposite conclusion in this case, the Court of Appeals for the Fifth Circuit, while acknowledging that the action is *in rem*, refused to follow these direct precedents, and based its contrary decision primarily on its prior holding (now before this court for review) that a transitory action *in personam* may, on the defendant's motion, be transferred to a district in which venue could not have been laid without the defendant's consent.[4]

Here, the question is whether an action *in rem* may be transferred to a court which had no jurisdiction of the *res*, and in which, accordingly, the action "might (not) have been brought"—at the very least, in the absence of the consent of both parties.

The district court cases of *The Providence*, 293 Fed. 595 (DC RI-1923) and *The Yozgat*, 127 FS 446 (ED Pa.-1954), cited by the Court of Appeals for the proposition that a "thing may submit to a particular court", do not support the court's affirmative answer to the foregoing question.

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[4] *Cf.* the companion cases of *Ex parte Blaski*, 245 F2d 737 (CA 5-1957), *Blaski vs Hoffman*, 260 F2d 317 (CA 7-1958), *certiorari* granted, 359 US 904, and *Sullivan vs Behimer*, 261 F2d 467 (CA 7-1958), *certiorari* granted, October 12, 1959. The Court of Appeals also cited *Andino vs The SS Claiborne*, 148 FS 701 (SD NY-1957), and *May vs The Steel Navigator*, 152 FS 254 (SD NY-1957), as authority for transfer of an *in-rem* proceeding to a district in which the *res* could not have been found; but in each case the vessel, while named in the title of the proceeding, was apparently not seized, nor a letter of undertaking given, to perfect *in-rem* jurisdiction. Thus, the orders of transfer could have referred only to the *in-personam* actions, *Andino* stands on equal footing with *Ex parte Blaski* and *Sullivan vs Behimer*, and no objection was made to the transfer in *May*.

In each of the cited cases, both libelant and claimant agreed to confer jurisdiction *in rem* on the court.[5]

In the present case, petitioner has never agreed to confer jurisdiction *in rem* on the transferee court; and the cases, just cited, holding that such jurisdiction can be conferred by consent, would at all events appear inconsistent with the established rule that the parties are powerless to confer jurisdiction by consent on a court which has no other basis for jurisdiction.[6]

This points up the distinction between this case, involving questions of jurisdiction properly so-called, and cases of the *Blaski vs Hoffman* line, involving questions of "personal jurisdiction", which relates not to the competence of the court, but to a privilege of the defendant, and is, within the boundaries of this country, closely related to, if not precisely the same as, the concept of venue.[7]

A defendant may in effect confer consent jurisdiction over his person by waiving his objection thereto; where

[5] Nor is the decision of the District Court for the Southern District of New York in *The New England*, 47 F2d 332 (1931), also cited by the Court of Appeals, in point here. In that case, the vessel was in fact seized and released upon claimant's filing a stipulation for value, and the only question before the court was whether libelant could recover, in that proceeding, a sum greater than the amount of the security substituted for the *res*.

[6] *Neirbo Co. vs Bethlehem Shipbuilding Corporation*, 308 US 165 (1939). Accord: Restatement of the Law, *Conflict of Laws*, section 81, *Comment g*.

[7] *Cf. Neirbo Co. vs Bethlehem Shipbuilding Corporation*, 308 US 165 (1939); *General Investment Company vs Lake Shore Railway Company*, 260 US 261-(1922); *Macon Grocery Company vs Atlantic Coast Line Railroad Co.*, 215 US 501 (1910).

as jurisdiction of an action, properly speaking, may not be conferred by consent of the parties."

Accordingly, there would seem to be considerable question as to whether *in-rem* jurisdiction may be conferred, in the absence of the *res* from the court's territorial jurisdiction, even by consent of both parties.

In *The Resolute*, 168 US 437, 439 (1897), this court recognized that the jurisdictional requirement "that the property proceeded against is within the lawful custody of the court", is one of the essentials for jurisdiction in the sense of "the power to adjudicate a case upon the merits".[9]

In *Ex parte Peru*, 318 US 578, 587 (1943), this court similarly held that "this case presents no question of the jurisdiction of the district court over the person of a defendant . . . . Here the district court acquired jurisdiction *in rem* by the seizure and control of the vessel, and the libelant's claim against the vessel constituted a case or controversy which the court had authority to decide."

In *Cooper vs Reynolds*, 10 Wall. 308, 316 (1870), this court enumerated four separate jurisdictional concepts:

[8] *Neirbo Co. vs Bethlehem Shipbuilding Corporation*, 308 US 165 (1939).

[9] In *Neirbo Co. vs Bethlehem Shipbuilding Corporation*, 308 US 165, 167 (1939), this court pointed the distinction between jurisdiction in the sense of the "power to adjudicate", which cannot be conferred by consent of the parties, and jurisdiction or venue in the sense of "the locality of a law suit", which can. 28 USC 2461 provides that actual seizure of the vessel may be dispensed with in an *in-rem* admiralty case, upon filing of a bond by the claimant.

"the power of the court over the parties, over the subject-matter, over the *res* or property in contest, and . . . the authority of the court to render the judgment or decree which it assumes to make."

In the same case, this court held that in an *in-rem* proceeding, "the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential to jurisdiction". 10 Wall. at 319.

The Restatement agrees that "a chattel is subject to the jurisdiction of the state within which it is" found, and that consent can confer only "jurisdiction over persons", not "jurisdiction over a thing";[10] and it is well settled that removal of the *res* from the court's territorial jurisdiction, without fraud or impropriety, destroys pending *in-rem* jurisdiction of the case.[11]

The necessary relation between presence of the ship and power of the court, is emphasized by the rule that

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[10] *Conflict of Laws*, section 49, and section 81, *Comment h*. Dicey states that *in-rem* admiralty jurisdiction vests only if the vessel is within the court's territorial jurisdiction. *Conflict of Laws* (5th ed.-1932), 269. Accord: *The Willamette*, 53 Fed. 602 (DC Wash.-1892). *Cf.* the anomalous decision, in *Internatio-Rotterdam, Inc. vs Thomsen*, 218 F2d 514 (CA 4-1955), that a court having no jurisdiction of the *res* has power to transfer an *in-rem* action to the court having jurisdiction of the *res*.

[11] *Martin vs The Bud*, 172 F2d 295 (CA 9-1949), and decisions cited. See Restatement of the Law, *Conflict of Laws*, section 105, *Comment b*. This rule does not apply when the vessel which is the subject of the suit has been released from seizure upon posting of bond pursuant to 28 USC 2464. Beale points out that the rule as to loss of jurisdiction is *contra* as to jurisdiction *in personam*. 1 *Conflict of Laws* (1935) 336, section 76.1.

"by virtue of dominion over the thing all persons interested in it are deemed to be parties to the suit, the decree binds all the world and under it the property itself passes and not merely the title or interest of a personal defendant".[12]

It thus appears that the transferee district in this case, since the *res* was not present therein, was not a district in which this action "might have been brought".

Therefore, even reversal of *Blaski vs Hoffman* and *Sullivan vs Behimer*, on a holding that an action may be transferred to a court on which the defendant has conferred jurisdiction over his person by waiving his objection thereto, would not necessarily involve affirmance of the holding below in this case.[13]

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[12] *Rounds vs Cloverport Foundry Company*, 237 US 303, 306 (1915). See Restatement of the Law, *Conflict of Laws*, section 102, *Comment a, Illustration 3*.

[13] Affirmance of the *Blaski* and *Sullivan* decisions would, on the other hand, necessarily entail reversal in this case; and it should be noted that the preponderance of commentary favors the correctness of the holding of the Court of Appeals for the Seventh Circuit in the *Blaski* case. See Notes, 27 George Washington Law Review 604, 57 Michigan Law Review 772, 45 Virginia Law Review 291, 72 Harvard Law Review 1375 (1959).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be reversed, and the case remanded to that court for reversal of the District Court's order of transfer.

Eberhard P. Deutsch,
Attorney for Petitioner

Deutsch, Kerrigan & Stiles,
Malcolm W. Monroe,
René H. Himel, Jr.,
Of Counsel

November, 1959

APPENDIX

LETTER OF UNDERTAKING

July 23, 1958

Continental Grain Company
c/o Messrs. Deutsch, Kerrigan & Stiles
1800 Hibernia Bank Building
New Orleans, Louisiana

Re: Continental Grain Company
vs Federal Barge Lines, Inc.
and Barge *FBL 585*
No. 3656 in Adm., E.D. La.

Gentlemen:

In consideration of your not having seized, under the *in rem* process which has been issued in the captioned action, our Barge *FBL 585*, which is presently tied up at our fleet in the port of New Orleans within the jurisdiction of the United States District Court for the Eastern District of Louisiana; and in further consideration of our not being required to post the usual bond for the release of that vessel,

We agree that we shall, within the delays allowed by law and/or the rules of court, file claim to Barge *FBL 585*, and pleadings in the above-entitled and numbered action; and that, vessel lost or not lost, we shall pay any final decree which may be rendered against said vessel in said proceeding.

It is the intent of this undertaking that the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in rem* process, and released by the filing of claim and release bond, we, as claimant, reserving in behalf of the vessel all other objections and defenses otherwise available except those which might be predicated upon the fact that the vessel was not actually so seized.

Very truly yours,

FEDERAL BARGE LINES, INC.
By s/ Noble C. Parsonage
NOBLE C. PARSONAGE
Vice President-Treasurer

Supreme Court of the United States

OCTOBER TERM, 1959

No. 229

CONTINENTAL GRAIN COMPANY,
Petitioner,

versus

BARGE FBL-585
and
FEDERAL BARGE LINES, INC.,
Respondents.

BRIEF FOR RESPONDENT.

CHARLES KOHLMEYER, JR.,
1836 National Bank of
Commerce Building,
New Orleans 12, Louisiana,
Attorney for Respondent.

LEMLE & KELLEHER,
SELIM B. LEMLE,
GEORGE B. MATTHEWS,
BURCH, PORTER, JOHNSON & BROWN,
Of Counsel.

HAUSER PRINTING CO., INC., NEW ORLEANS

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BRIEF FOR RESPONDENT.

INTRODUCTION

Respondent accepts the jurisdictional statement and generally accepts the "Statement of the Case" contained in petitioner's brief, but controverts petitioner's presentation of the issues involved as being too narrow.

STATUTE (AND RULE) INVOLVED

In addition to the statute cited as being the sole "Statute Involved" (28 U.S.C. 1404(a)), it is respondent's contention that Admiralty Rule 44 also serves as the basis for a District Court to exercise the power to order the transfer of an admiralty case. Rule 44 reads as follows:

> "In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts

are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules."

QUESTION PRESENTED

The "Question Presented" as set forth in petitioner's brief is too limited in its context. This case, it is submitted, requires a consideration and determination of whether, it having been determined that the convenience of the parties and the speedy and efficient administration of justice requires such action,[1] a District Court may, on motion of the respondent, transfer an admiralty suit brought both *in personam* and *in rem* to another District wherein the *in personam* respondent was sueable, but from which the *res* had been removed prior to the filing of the libel.

Respondent shows that its original motion to transfer (R. 9) was not based solely on 28 U.S.C. 1404a, and that even though the District Court and the Court of Appeals below relied upon the statute as the sole authority for ordering the transfer, the source of the power to transfer may be found in the general admiralty practice and in Rule 44.

ARGUMENT

Feeling that we would be transgressing on the time of the Court if we were to repeat the arguments which have been made in brief and will be made orally in *Blaski* (No. 25) and *Behimer* (No. 26), our argument will be directed to the marked distinction between the instant admiralty case and those civil actions insofar as transfers are concerned. This distinction, we submit, is such that an affirmance of *Blaski* and *Behimer* will not

[1] Opinion of the District Court below (R. 19).

require a reversal here; their reversal, however, necessarily will lead to an affirmance here.

In this case, unlike in *Blaski* and *Behimer*, the alternative forum contemplated by the exact wording of Section 1404a was present and available to petitioner at the time the libel was filed: the *in personam* respondent was sueable in the transferee District, and unless the fact that *Barge 585* was removed from Memphis to New Orleans shortly after the occurrence of the incident giving rise to this litigation is held to be determinative of the problems presented, all requisites of Section 1404a were met.

It is to be noted that at the time the motion to transfer was presented to the District Court in New Orleans, there was pending in the United States District Court at Memphis a suit at law wherein Federal Barge Lines was seeking a recovery from Continental Grain for the damage sustained by its *Barge 585* through alleged improper loading. This suit by Continental Grain against Federal Barge Lines in New Orleans sought a recovery for the cargo on board *Barge 585* which had been damaged in the incident which gave rise to the Memphis litigation,[2] the first of the two actions.

It is quite obvious, we submit, that the finding of the District Court (R. 19) that the case requires transfer is correct.[3] Petitioner apparently recognizes the fact that the District Court's findings in this regard are not

[2] The questions raised by Judge Brown in the Court of Appeals below (Opinion, footnote 2, R. 43) concerning compulsory counterclaims, *res judicata*, and collateral or judicial estoppel, are not presently before the Court. A decision on these questions must await the determination of the forum which will ultimately try this case on the merits.

[3] "The efficient administration of justice requires that this claim for cargo damage be tried by the same Court which is trying the claim for hull damage, both claims being between the same parties and relate to the same incident" (Opinion of District Court, R. 19).

subject to challenge and no attack is made on those findings or, apparently, on the right of the Court to exercise its authority to transfer insofar as the *in personam* portion of the suit is concerned. Petitioner's argument is addressed solely to the proposition that the *in rem* portion of the suit could have been brought only in New Orleans, where the barge was physically located, and, the argument goes, the litigation may not be transferred to Memphis because Section 1404a requires the existence of alternative forums, which are non-existent here.

(1) *The District Court Has The Inherent Power To Order The Transfer*

It is submitted that the District Courts of the United States sitting as Courts of Admiralty do not require statutory authority to vest in them the power to order the transfer of admiralty cases on *forum non conveniens* grounds. We submit that the procedure in admiralty and maritime causes of action historically has been liberal, and has been developed in order to mete out justice in a speedy and efficient manner. The niceties of practice at common law have never been observed on the admiralty side of the docket of the District Courts.

The historical development of Admiralty third party practice prior to the adoption of General Admiralty Rule 56 is illustrative of the power of the District Courts. In the leading case of *The Hudson*, 15 Fed. 162 (1883), Judge Addison Brown, an eminent admiralty practitioner and jurist, had before him the question of whether or not, in the absence of any General Admiralty Rule, a third party could be vouched into litigation as a joint tort-feasor or party liable over. Likening the admiralty practice to the equity practice and relying in part on Justice Story's leading work on "Equity Pleading," he

found that the general rule of equity was that all parties interested in the subject matter of a controversy are necessary parties thereto, and held that logical and proper practice required the presence of all parties involved in a collision case, even though one or more of them had not been made a respondent in the libel. He pointed out that:

> "The court ought not to be liable, as a rule of practice, to be called on to try and determine actions of this character twice or thrice upon the facts, in as many independent suits. The testimony of the witnesses, moreover, whose lives are chiefly upon the sea, is often difficult to be procured. From their roving character, after a short time all trace of them is often lost, and a subsequent suit for contribution involving the trial of the whole question of liability *de novo* would have little chance of justice through the probable loss of material evidence on the one side or the other. * * *
>
> "And even if the remedy against the other vessel, or her owners, for contribution, were still available, and the same witnesses were still procurable, the liability to perversions of the truth in any subsequent suit after the decision of the court had once been made known upon the facts of the case, would be so great, considering the witnesses in such cases; the difficulties of the trial would be so greatly increased through the varying testimony; and contrary judgments as to the same collision would sometimes be so unavoidable, that the result of the practice of admitting successive independent suits concerning the same collision could hardly fail to discredit the administration of justice." 15 Fed. 162, 169.

The decision in this case was the basis for other Courts finding authority to extend the principle laid down by Judge Brown. It also served as the basis for

Admiralty Rule 59, which was promulgated by Your Honors in 1883, but was limited to collision cases. It was not until 1920 that old Admiralty Rule 59 became the present Rule 56 and authorized third party practice in admiralty cases other than collision actions. In the interim between 1883 and 1920, *Benedict on Admiralty* (6th ed., 1940) Vol. 2, § 349, Page 534, Note 24, cites twenty-one non-collision cases where the Courts applied the third party practice authorized by the old 59th Rule by analogy to cases other than those involving collisions.

The history of the Rule is given and the matter is discussed in the opinion of Mr. Justice Clark in *British Transport Commission vs. United States (The Haiti Victory—Duke of York)* 354 U.S. 129, 77 S. Ct. 1103 (1957), where, in summarizing the history of the present 56th Rule, Mr. Justice Clark pointed out that:

> "* * * the Rules were not promulgated as technicalities restricting the parties as well as the admiralty court in the adjudication of relevant issues before it. There should therefore be no requirement that the facts of a case be tailored to fit the exact language of a rule." 354 U.S. 129, 136.

In that case, of course, the Court had before it for the first time the question of whether or not a party could be impleaded in a limitation of liability proceeding. The rationale of the decision, however, shows clearly the desire of Your Honors to require that the rights and liabilities of all parties be adjudicated in one single litigation rather than in scattered and piece-meal segments. The following quotation from the opinion, although referring to third party practice, is singularly apposite in the instant case:

> "Logic and efficient judicial administration require that recovery against all parties at fault is

as necessary to the claimants as is the fund which limited the liability of the initial petitioner. Otherwise this proceeding is but a 'water haul' for the claimants, a result completely out of character in admiralty practice. Furthermore, the Commission entered this proceeding voluntarily without compulsion. It filed an answer asking that justice be done regarding the subject matter, the collision; it denied all fault on its part and affirmatively sought to place all blame on the Haiti; it claimed damage in the sum of $1,500,000; and it contested the Haiti's claim of limitation or exoneration. In all of these respects judgment went against the Commission—it lost. Now having lost, it claims that the court has wholly lost jurisdiction while had it won, jurisdiction to enter judgment on all claims would have continued. It asserts that neither the Haiti, which was damaged to the extent of some $65,000, nor any of the other 115 claimants may prove their losses against it. But reason compels the conclusion that if the court had power to administer justice in the event the Commission had won, it should have like power when it lost. *Whether it is by analogy to Rule 56 or by virtue of Rule 44, or by admiralty's general rules heretofore promulgated by this Court, we hold it a necessary concomitant of jurisdiction in a factual situation such as this one that the Court have power to adjudicate all of the demands made and arising out of the same disaster. This too reflects the basic policy of the Federal Rules of Civil Procedure, 28 U.S.C.A. Admiralty practice which has served as the origin of much of our modern federal procedure, should not be tied to the mast of legal technicalities it has been the forerunner in eliminating from other federal practices.*" (Italics ours) 354 U.S. 133, 138.

There is no reason, we submit, why statutory authority must be invoked to apply the doctrine of transfers by

reason of *forum non conveniens* in admiralty. That power exists inherently in the Court by virtue of the historic practice, without the use of this Court's rule making power. This is demonstrated by Your Honors present Admiralty Rules 51 *et seq.*, dealing with Limitation of Liability and how it is claimed. Rule 54, which designates the Courts having cognizance of limited liability proceedings, particularly authorizes transfers and provides that:

> " * * * The District Court may, in its discretion, transfer the proceedings to any district for the convenience of the parties."

We submit there is no practical difference between an admiralty petition seeking limitation of liability and an admiralty suit seeking to impose a tort lien.

Admiralty Rule 44 clothes a District Court with complete and plenary authority to regulate its practice in such a manner as it deems expedient for the due administration of justice. Such a rule is an essential where the Court is dealing, for the most part, with a "*res*" which is "in transit" most of the time. Assume for example, a collision in a river which is the boundary between two states—a common situation on the Eastern seaboard as well as in the Mid-West where approximately fifteen states border on the Mississippi River and its major navigable tributaries. If a collision were to occur in the Hudson River at a point where it divides New York and New Jersey, and one of the vessels were to proceed to Manhattan and the other to Hoboken, where is venue to be found? Is one libel to be filed in New York and the other libel in New Jersey? Are the two cases to run parallel courses with duplicated testimony, but with possible opposite results? In these days of requiring form to be subservient to substance, such a rule

would be completely untenable and would be rejected summarily by Your Honors.

Nevertheless, admiralty has no counterpart of Rule 13a of the Federal Rules of Civil Procedure (the mandatory counterclaim Rule). We submit that an admiralty court could exercise the power conferred upon it by Rule 44 and direct the transfer and consolidation of the two actions in the hypothetical situation cited. That Rule, we submit, grants authority to the District Courts to transfer, consolidate, or take any other action directed to the prompt and efficient administration of justice. We therefore urge that Your Honors base your holding herein not on the narrow statutory ground that Section 1404(a) of the Judicial Code empowers a District Court to order a transfer on *forum non conveniens* grounds, but rather on the classic principle that pleading and practice in the admiralty courts is designed to be liberal and subservient to the paramount principle of those courts dispensing speedy and efficient justice.

(2) *The District Court Has The Power Under Section 1404(a) To Order The Transfer*

Even assuming, however, that the power to transfer does not exist in a District Court inherently, or result either expressly or impliedly from Rule 44, we nevertheless submit that transfers may be made under the direct authority of Section 1404(a) of the Judicial Code—and this, whether the libel be *in personam* or *in rem*.

Unlike the civil diversity jurisdiction of the District Courts of the United States,[4] no limitation on venue as to the "district of the plaintiffs" or the "district of

[4] Act of June 25, 1948, c. 646, 62 Stat. 935, 28 U.S.C. 1391.

the defendants" is present in an admiralty proceeding. It has been settled for many years that the District Courts, sitting as courts of admiralty, have jurisdiction over any cause cognizable in admiralty where the respondent is amenable to process, either in person or through the means of a foreign attachment.

> "* * * By the ancient and settled practice of courts of admiralty, a libel *in personam* may be maintained for any cause within their jurisdiction, wherever a monition can be served upon the libelee, or an attachment made of any personal property or credits of his; and this practice has been recognized and upheld by the rules and decisions of this court." (Citations of authority omitted). *In re Louisville Underwriters*, 134 U.S. 488, 10 S. Ct. 587 (1890).

The foregoing principle is carried into the Admiralty Rules in Rule 2, which authorizes the commencement of a suit *in personam* by "simple monition in the nature of a summons to appear and answer" or by the attachment of property in the hands of garnishees if the respondent is not found in the district.

We submit that there is nothing in the incidental fact that this claim was urged *in rem* against *Barge FBL-585* that militates against the transfer of this cause. After the filing of the libel, Federal gave petitioner a letter of undertaking in which it agreed to satisfy any decree which might be rendered against the barge. The giving of this letter created no new obligation on Federal. The effect of the letter was simply an agreement by Federal that it would do that which it could be forced to do if Continental were to obtain judgment in the *in personam* action and were to arm itself with process under the final decree and enforce execution. It is true, of course, that the undertaking provided that it was

given in lieu of a bond, and that the action should proceed as if *in rem* process had been issued and a formal surety bond had been posted. This procedure, however, is quite customary and may not be termed at all unusual.

As every proctor in admiralty knows, the classic jurisdictional statement in a libel *in rem* is that "the vessel now is, or, during the pendency of process herein, will be within the District and the jurisdiction of the Court".[5] However, many libels *in rem* are started and ended without a *res* in the form of the vessel being within the district.

> "* * * In other words, it is as possible to have a voluntary appearance of the res in a suit in rem when the res is outside of the territorial jurisdiction of the Court as it is to have a voluntary appearance in a suit in personam when the person is outside such jurisdiction." *J. K. Welding Co. vs. Gotham Marine Corporation*, 47 F. 2d 323, 335 (1931).

In that case, a motion was made to increase the amount of a claim propounded by a libel *in rem* after the filing of a stipulation for value, and to compel the giving of an additional or increased stipulation. Judge Woolsey reviewed the theory of bonding a vessel and pointed out that the inchoate lien of a maritime lien claimant ripens into a executory lien with the filing of a libel, but that the lien is discharged by the giving of the stipulation for value or a bond and the release from seizure of the vessel to her owner or claimant. He pointed out that:

> "The claimant is not a party in such a case except to the extent of his res, which is his stake in the litigation, and his signature to the stipulation for value does not submit him to the jurisdiction of

[5] *cf.* Admiralty Rule 22.

> the court to a greater extent, or subject him to liability for a greater amount, than that for which he stipulates to be liable. The court's jurisdiction is not personal over the claimant but in rem over the stipulation for value.
>
> * * * * *
>
> "A stipulation for value is an agreement with the court by the claimant involving the substitution by the claimant of a chose in action against himself—usually, of course, with joint stipulators for security's sake—as the res to take the place of the vessel or other property sued in rem." 47 F. 2d 332, 334, 335.

In *The Providence*, 293 Fed. 595 (1923), an objection was made by an impleaded party to the jurisdiction of the Court on the theory that the vessel proceeded against was not actually in the District and had never been seized. The claimant had appeared voluntarily and furnished a bond which the Court held was sufficient, saying:

> "It is the contention of Mugan, the pilot, that in order that this court may have jurisdiction it must appear that at the time of filing the libel and issuing the process the vessel was actually within this district, and that, as against him at least, no consent of parties can confer jurisdiction. It is not contended that an actual seizure is essential to give jurisdiction. It is conceded that this may be obviated by appearance and giving bond to the marshal, or by stipulation for value; but it is contended that the vessel must be within reach of the court's process. While it is required by admiralty rule 22 that there shall be an allegation 'that the property is within the district,' a res is not necessarily a vessel, and a stipulation for value, which is a substitute for the res, being now on file, I am of the opinion that, whatever force

there might have been in Pilot Mugan's objection to jurisdiction prior to the filing of the stipulation; the situation is materially changed by the fact that a substitute for the res is now within the control and subject to the disposition of the court, according to its finding of the merits of the cause of action." 293 Fed. 595, 596.

Benedict on Admiralty (6th ed., 1940) Vol. 2, § 242, Page 78 explains the proposition as follows:

> "* * * The District Court does not obtain jurisdiction if the property is attached or arrested outside the limits of the district, unless the claimant waives the irregularity of the property being outside the district. Thus if the claimant of the *res* files a general appearance and a claim and admits the allegation 'that the property is, or during the currency of process will be within the district,' the jurisdiction in the district where the libel *in rem* has been filed becomes complete in respect of the *res* and the parties. The fictitious allegation that the *res* is within the district, and the waiver of the irregularity by the claimant, enables parties to conduct suits *in rem* in any district satisfactory to them."[6]

We submit that *The Providence*, *supra*, and *The Yozgat*, 127 F. Supp. 446 (1954), directly support the proposition contended for and permit the voluntary appearance of the owner of a *res* proceeded against in a District where it is not present. In *The Yozgat*, Chief Judge Kirkpatrick indicated that jurisdiction *in rem* could be obtained by a stipulation and a deposit of a fund to the same extent as if a seizure had been effected; and in another case, arising out of the same factual situation, but involving different litigants, (*The Yozgat*, 112 F.

[6] *cf. The Frank Vanderkerchen*, 87 Fed. 763 (1898). In that case, the Court noted the practice prevailing even then in the New York district, to bond a claim before actual seizure. And note Judge Brown's opinion below (R. 46).

Supp. 933 (1953)), Judge Dimock in the Southern District of New York directly held that the practise was not improper even though the cargo proceeded against was physically located in Philadelphia rather than in New York. The respondent in the latter case contended that:

> "* * * since the cargo itself was not and never had been within the jurisdiction, the libel in rem must be dismissed and the freight that has been deposited by the cargo claimant must be returned to the claimant.
>
> "Taking this position, respondent ignores the practice of conferring jurisdiction upon a district convenient for the parties by admission of the court's jurisdiction on the part of the owner of the res and his placing in the jurisdiction of the court money, as in this case, or a stipulation for its value, as a substitute for the res." 112 F. Supp. 933, 934.

The decision of a ship owner or claimant to file a bond or stipulation for value for his vessel, even though the vessel is not present within the territorial jurisdiction and is not subject to seizure under the admiralty warrant, is, we presume, simply a consent to the venue of the Court. Conceptually, it does not matter whether it be so considered, or if it be considered as a waiver of the right to be sued at the place where the vessel may be found. It is our submission, however, that it is a necessity in cases of *in rem* jurisdiction where the *res* is transitory so to speak, and moves from district to district and, indeed, from country to country.

Whether the "consent" to the venue of a Court be given by the voluntary appearance of a claimant and the voluntary filing of a stipulation or bond for a vessel not then present, or whether the consent to be sued in a different venue be evidenced by a motion to transfer the

jurisdiction from the forum in which the suit is pending to a more convenient forum, involves, we submit, no difference in theory. The admiralty courts impose no sanction on a claimant who voluntarily submits to the jurisdiction of the court. Conferring jurisdiction where it would not otherwise exist in such a case is a common practice in the Admiralty, and bears no resemblance to those instances of litigants attempting improperly to confer jurisdiction on Courts. The nature of the Admiralty requires the practice. Owners with their home offices located in New York may not want to bring their counsel and their staffs to San Francisco or New Orleans; if collisions occur on the West Coast or in the Gulf, (or, indeed, on the high seas), litigation properly may be filed in the District Court of New York without fear of a charge of attempting improperly to confer upon that Court the power to determine the dispute between the parties.

No inference of contempt for the Rules of this Court and no disposition of the Admiralty Bar to disregard the law may be drawn from the practice. General Admiralty Rule 10 contemplates the commencement of an *in rem* action without the issuance of process, and under Section 2464 of Title 28 of the Judicial Code, a "general bond" may be filed to serve as a stay and assurance against seizure.[7] In other words, after a "general bond" has been given, the vessel may sail on her voyage and subsequent

[7] 28 U.S.C. § 2464, taken from the old Revised Statutes, § 941, provides in part:

> "The owner of any vessel may deliver to the marshal a bond or stipulation, with sufficient surety, to be approved by the judge of the district court, conditioned to answer the decree of such court in all or any cases that are brought thereafter in such court against the vessel. Thereupon the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by libellants in such suits which are begun and pending against such vessel."

libels may be filed *in rem* to the same extent as if the ship were still present in port. Those libels are no less *in rem* because of the ship not being within the reach of process.

The rule is one of reason, generated by the fact that time is of the essence in shipping circles. A libel filed on a holiday or weekend may cost an owner thousands of dollars of detention before a bond can be made; or a libellant, knowing that a vessel has a quick turn-around schedule in port, may want to file his suit in advance of the ship's arrival to be certain that he can effect a seizure or procure a bond to secure his claim after the ship arrives. The rule accordingly serves both parties to the suit, depending on the situation.

As we have pointed out above, the consent to the jurisdiction of the Court is simply an easy and practical method of handling what could otherwise be a very expensive and time consuming practice. It is submitted that there is no reason why the hazard of an expensive shut-down of a ship, or of a claimant losing a chance to seize a ship should be run by litigants who could, by consent, agree in advance of the time the ship was due to arrive in port, that a bond for the value of the vessel would be given. Rules of practice, particularly in admiralty, are to make justice easily attainable, not to make the course of the law burdensome and difficult.

It is probably for the foregoing reasons that the only cases we have found in the narrow field under consideration are cases which favor the position taken by us. In *Torres vs. Walsh*, 221 F. 2d 319 (2d Cir. 1955), *cert. den.* 350 U.S. 836, 76 S. Ct. 72 (1955), Judge Medina for the Second Circuit squarely held that it was proper to order the transfer of an *in rem* case to another district on

motion of the respondent and over the objection of the libellant. In that case, a "longshoreman-seaman" injured aboard the *SS Rosario* in Puerto Rico, where practically all of the witnesses lived, brought suit in New York. In affirming the order of transfer, Judge Medina said:

> " * * * perhaps because District Judges sitting in admiralty here were thought to be more generous than those in Puerto Rico, this proceeding was commenced in the United States District Court for the Southern District of New York, where personal service of citation was made and a monition issued, pursuant to which the vessel was seized and released upon the filing of the usual undertaking. The claimant-respondent, perhaps also thinking the judges in Puerto Rico might award a less ample recovery, and relying on the obvious convenience of 'parties and witnesses,' moved under Section 1404(a) to transfer the case to Puerto Rico. This raised the question of whether an in rem proceeding in admiralty was within the scope of Section 1404(a), a matter of statutory interpretation, and also the question of whether the District Court in Puerto Rico would have power to proceed in rem. While it did appear that the vessel had frequently been in the territorial waters of Puerto Rico, it was equally clear that no attempt had been made to seize her there, and the only jurisdiction in rem was that of the District Court in New York.
>
> "The first question is whether the District Judge has exceeded his power under Section 1404(a), by transferring the case to a district where it might not have been commenced originally. Section 1404(a), it will be recalled, authorizes a transfer only 'to any other district or division where it might have been brought.' While in a sense it is true that an in rem proceeding might have been brought in Puerto Rico, as the vessel had been there from time to time, it may not be doubted

that the Congress intended no transfer in any case where the transferee court lacked competence to proceed. As a proceeding in admiralty has been held to be included in the phrase 'any civil action', it is probable that we would hold that the transfer of an in rem admiralty case to a court having no jurisdiction or power over the res was unauthorized, although the question is not entirely free from doubt. But we do not reach that question here as the respondent-claimant has agreed voluntarily to appear in the action in the District Court of Puerto Rico, there appears to be no difficulty on the score of venue, and the Judge granting the transfer has provided in his order that the transfer shall be effective only upon the filing of a bond or stipulation by the claimant of the SS ROSARIO to pay any judgment or decree recovered against the vessel. Accordingly, we conclude that there was no lack of power to make the order, as the District Court of Puerto Rico will be in effect a court where the action might have been brought." 221 F. 2d 320, 321.

The same holding was made in *Andino vs. The SS Claiborne*, 148 F. Supp. 701 (1957)[8] and *May vs. The Steel Navigator*, 152 F. Supp. 254 (1957), both out of the South-

[8] This case and the companion case of *Ayala vs. A. H. Bull SS Co.* 148 F. Supp. 703, arose in 1957 in the Southern District of New York. Both cases involved claims by longshoremen for injuries sustained in Puerto Rico. Both libellants thereafter moved to New York, and the cases are identical except for a difference in the times that the libellants established their alleged new residences in New York. We find nothing in the opinion to support the statement of petitioner (Brief, Page 7, footnote 4) that the vessel "was apparently not seized, nor (was) a letter of undertaking given, to perfect *in rem* jurisdiction". The same is true of the *May* case, *supra*, also referred to in the same footnote of petitioner's brief. In the *Andino* case, Judge Bryan held:

> "One further point must be considered. Respondent apparently does not do business in Puerto Rico and libelant could not have brought the action against it there in the first instance. However, respondent has not only consented that the action be transferred to Puerto Rico by making this motion, but expressly agrees that it will voluntarily appear there. This satisfies the requirements of Section 1404(a) that the District to which transfer is sought must be one where the action 'might have been brought'."

ern District of New York; and Judge Walsh in the District Court so held in the *Torres* case, 125 F. Supp. 496 (1954).

Internatio-Rotterdam Inc. vs. Thomsen, (The Karachi), 218 F. 2d 514 (1955), shows that the Fourth Circuit favors the view of the Second Circuit and the Fifth Circuit as exemplified in *Torres* case and the instant case when decided below. *The Karachi* involved a motion to transfer from New York to Maryland prior to the time that *in rem* process had been issued. Judge Parker, speaking for himself, Judge Soper and Judge Dobie, held that the Court had the power to transfer and reversed the holding of the Maryland District Court to the contrary. Although the case is distinguishable from the one at bar, it nevertheless indicates that philosophically the Fourth Circuit favors the application of the doctrine that an *in rem* suit may be transferred on the motion of the claimant.

It is to be noted that *The Jersbek*, 140 F. Supp. 851 (1956) relied upon heavily by petitioner, involved an attempt to force the claimant into the transferee jurisdiction. A transfer on motion of a claimant and a transfer on motion of a libellant are two different things. We do not here contend, and it is our submission that it would be error for a Court to hold, that a coercive transfer of a claimant to a different jurisdiction than that in which the suit was filed is proper. The concept of transferee jurisdiction is that there must be two available forums, and unless the moving party is the claimant, there is no secondary or transferee forum to which the case could be transferred. This situation is well pointed up in the footnote to Judge Parker's opinion in *The Karachi*, *supra*, for it would never do to permit a plaintiff to sue a defendant in the Court of the defendant's domicile and then move

to force the defendant to appear in a different jurisdiction. Thus the fear expressed by Judge Hand in *Foster-Milburn Co. vs. Knight*, 181 F. 2d 949 (2d Cir. 1950), that a California plaintiff might "fetch him (a New York defendant) 2,000 to 3,000 miles away for trial in a district where he does not live and where he has never set foot" has no application to the doctrine which we are invoking.

We hesitate here to open the question of the genesis of an *in rem* proceeding in admiralty and just how far the personification theory should be carried. For a very brief but compendious discussion of the growth of the American theory, we commend to the Court's attention the discussion contained in Gilmore & Black, *The Law of Admiralty*, (1st Ed., 1957) § 9-3, p. 483, *et seq.*

It may well be that the United States Courts have gone too far in pursuing the personification theory, and that the Courts fell into error through a failure of the earlier decisions to distinguish between a forfeiture (a true proceeding against the thing itself) and the exercise of jurisdiction *in rem* (where it might be, as is apparently held in England,[9] that the proceeding is only to force the appearance of the shipowner and secure payment of the claim). Even though it is impracticable in the present case to go too deeply into the theory of the fiction, we believe it would not be amiss to point out, as is said in Gilmore & Black, *supra:*

> "* * * But when a fiction has served out its time and purpose, its disappearance, even when it is as agreeable and harmless as the fiction of ship's personality, is always to be welcomed".[10]

In *Consumers Import Co. vs. Kabushiki Kaisha Ka-*

[9] *The Bold Buccleugh*, 7 Moore, P.C. 267, 13 Eng. Rep. 884 (1852); but see *The China*, 74 U.S. (7 Wall.) 53 (1868).

[10] Section 9-18, p. 510.

wasaki Zosenjo, 320 U.S. 249, 64 S. Ct. 15 (1943), suit was filed *in rem* against a ship and *in personam* against her operators for cargo damage arising out of a fire on board. The Fire Statute [11] was pled as a defense, but cargo urged that the Statute did not apply to an *in rem* claim and, on the contrary, served only to extinguish the maritime lien for the cargo damage. Relying to some extent on the *City of Norwich*, 118 U.S. 468, 6 S. Ct. 1150 (1886), Mr. Justice Jackson, for a unanimous Court, rejected the contention of the cargo interests saying in part:

> "* * * The Court (in the City of Norwich, discussed below) said that 'To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles.' The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age. * * * Congress has said that the owner shall not 'answer for' this loss in question. Claimant says this means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execution against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property. If the owner by statute is told that he need not 'make good' to the shipper, how may we say that he shall give up his ship for that very purpose? It seems to us that Congress has, with the exception stated in the Act, extinguished fire claims as an incident of contracts of carriage, and that no fiction as to separate personality of the ship may revive them." 320 U.S. 249, 253.

The *City of Norwich*, *supra*, (one of the early cases

[11] 46 U.S.C. § 182, which relieves the owner of a vessel for liability for damage to property on board due to fire, unless caused by his design or neglect.

interpreting the Limitation of Liability Statutes), likewise covered the question of whether the Limitation Acts were applicable to an *in rem* claim against a ship. Mr. Justice Bradley held in that case:

> "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated, unless where, for public reasons, the law exempts particular kinds of property from seizure, such as the tools of a mechanic, the homestead of a family, etc." 118 U.S. 468, 503.

The opinion then quotes with approval from *Boyd vs. United States*, 116 U.S. 616, 637, 6 S. Ct. 524 (1886), as follows:

> "* * * Nor can we assent to the proposition that the proceeding [*in rem*] is not, in effect, a proceeding against the owner of the property as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited. In the words of a great Judge, 'Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are.' Vaughan, C. J., in *Sheppard vs. Gosnold*, Vaughan 159, 172; approved by Ch. Baron Parker in *Mitchell vs. Torup*, Parker 227, 236."

Sacramento Navigation Co. vs. Salz, 273 U.S. 326, 47 S. Ct. 368 (1927) involved the question of whether or not a tug and a barge under common ownership were to be considered as one "vessel" for the purposes of the Harter Act. The contention was made that the bill of lading or shipping contract was for the barge alone, and implied a contract of towage rather than a contract of trans-

portation or affreightment. The Court answered the contention as follows:

> "The fact that we are dealing with vessels, which by a fiction of the law are invested with personality does not require us to disregard the actualities of the situation, * * *" 273 U.S. 326, 328.

Benedict deals with the point in the following manner:

> "The doctrine of the personality of the ship may be described as a fiction but the fiction is rather in the mode of expression than in the substance of the law. The principle is that one who has a contract, to which the ship is bound and which is breached, or who, through the instrumentality of the ship, has suffered a wrong that is within the maritime jurisdiction, shall have by way of security or redress, an enforceable interest in the ship." *Benedict on Admiralty* (6th Ed. 1940), Vol. 1, § 11, p. 17.

We submit that the foregoing authorities show clearly that the fiction of personifying the ship and thereby creating a lien thereon is for the purpose of providing security for a tort or a breach of contract cognizable in admiralty. The theory must stop somewhere, and although cases involving *in rem* claims may have to commence as if the ship were a personality, after a bond is posted, the case proceeds against the claimant who must defend and who must (*absent* security) pay any decree rendered against it. Accordingly, when Federal Barge Lines appeared and claimed its barge and furnished no security, even though it agreed in its undertaking that the litigation should proceed as if it had furnished a surety bond for the release of the barge, nevertheless the action became a personal action which it was defending, although on *in rem* principles. The *in rem* principles, however, are identical to the *in personam*

principles after a claim has been made and a bond filed, except in certain isolated instances, such as compulsory pilotage, which have no significance in the present context.

CONCLUSION

In summation, we submit that the District Courts of the United States sitting in Admiralty have plenary power, even without the aid of a statute and without authority from the Rules of this Court, to order the transfer of proceedings from one district to another. In the event that Your Honors should hold that such power does not exist inherently, then we submit that that power has been granted to the District Courts by Admiralty Rule 44. Finally, if Your Honors hold that Rule 44 has no application to this case, then the transfer should be permitted under Section 1404(a) of the Judicial Code for the reason that the consent of the claimant (or his waiver of his right not to be sued in the transferee jurisdiction) to an appearance in the transferee Court (the waiver or consent must be implied if it is not considered as expressed from the motion to transfer itself) satisfies the alternative venue requirement of the statute.

We submit that the decision in this case is not necessarily to be governed by the decisions in the companion cases of *Blaski* and *Behimer*. Reversal of those cases would necessarily require affirmance of the holding below, but affirmance would not necessarily entail a reversal here because of the additional grounds for the transfer afforded by Admiralty Rule 44 and the inherent power of a District Court sitting in admiralty.

For the reasons stated and because of the authorities cited, it is submitted that the decision of the United

States Court of Appeals for the Fifth Circuit is correct and should be affirmed, whether on identical or on other grounds.

Respectfully submitted,

CHARLES KOHLMEYER, JR.,
1836 National Bank of
Commerce Building,
New Orleans 12, Louisiana,
Attorney for Respondent.

LEMLE & KELLEHER,
SELIM B. LEMLE,
GEORGE B. MATTHEWS,
BURCH, PORTER, JOHNSON & BROWN,
Of Counsel.

December 14, 1959.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1959

No. 229

CONTINENTAL GRAIN COMPANY,
Petitioner

versus

BARGE FBL-585
and
FEDERAL BARGE LINES, INC.,
Respondents

REPLY BRIEF FOR PETITIONER

Eberhard P. Deutsch,
Hibernia Bank Building,
New Orleans 12,
Attorney for Petitioner

Deutsch, Kerrigan & Stiles,
Malcolm W. Monroe,
René H. Himel, Jr.,
Of Counsel

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1959

No. 229

CONTINENTAL GRAIN COMPANY,
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REPLY BRIEF FOR PETITIONER

I

The first part of respondents' argument is devoted to the proposition that the district court had some inherent extra-statutory power—specifically by virtue of Rule 44 of this court's General Admiralty Rules—to transfer this admiralty action; and that, therefore, any limitations attaching to the transfer power under 28 USC 1404a do not apply in this case.

It should be noted, however, that Rule 44's authorization to the district courts to regulate their practice is not plenary.[1]

Rule 44 itself limits its application to "cases not provided for by these rules or by statute".

Congress having enacted a statute governing transfer of all actions, including admiralty actions, a district court may not transfer an admiralty action otherwise than as provided by the statute.

II

Respondents also make the argument that there is no practical difference, and hence that there should be no difference in legal treatment, between *in-rem* and *in-personam* actions, since both classes take effect against the property of the opposing party.

Respondents intimate, on page 20 of their brief, that the only result of an *in-rem*, as distinguished from an *in-personam*, admiralty suit, is "to force the appearance of the shipowner and secure payment of the claim";

[1] *Cf. Washington & Southern Navigation Co. vs Baltimore & Philadelphia Steamboat Co.*, 263 US 629, 635-36 (1924): "No rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true, whether the court to which the rules apply be one of law, of equity, or of admiralty. It is true of rules of practice prescribed by this Court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred"; *Atlass vs Miner*, 265 F2d 312 (CA 7-1959), cert. gr., 361 US 807 (Rule 44 does not authorize a local rule for oral discovery depositions in admiralty); *Strusa vs Minnesota Atlantic Transit Co.*, 13 FS 872 (WD NY-1936) (local rule cannot extend right to trial by jury in admiralty cases beyond statutory authorization therefor).

and, on pages 23-24, that "the *in rem* principles . . . are identical to the *in personam* principles after a claim has been made and bond filed".

In the first place, any similarity in the effect of local and transitory actions, does not alter the established distinction between the jurisdictional requirements as to the two types of actions.

If two residents of New York are the opposing parties at interest in a mortgage foreclosure, or other local action, concerning land in California, the action can nevertheless be entertained only by a California court. *Ellenwood vs Marietta Chair Co.*, 158 US 105 (1895). The lack of jurisdiction in the courts of New York cannot be cured by the defendant's waiver, as lack of personal jurisdiction of a transitory action could be. *Northern Indiana Railroad Co. vs Michigan Central Railroad Co.*, 15 How. 233 (1853).

In the second place, there is more substance to the distinction between *in-rem* and *in-personam* admiralty actions than respondents have conceded.[2]

The privilege of suing a vessel *in rem* is more than a mere security device, and the "personalization of the

[2] It may be noted that *The Bold Buccleugh*, 7 Moore 267, 13 ER 881 (1851), cited on page 20 of respondents' brief as authority for the statement that the *in-rem* action is only a means of compelling the shipowner's appearance, seems to be directly to the contrary: "It is not correct . . . to say that the proceeding *in rem* is in all respects analogous to the proceeding *(in personam)* by foreign attachment, and that the former is merely to compel an appearance, because the latter is undoubtedly for that purpose only." 7 Moore at 283, 13 ER at 890. See footnote 6, *post*.

vessel" which permits such a suit is no mere legal fiction, as shown by the quotation from the leading admiralty authority on page 23 of respondents' own brief.

Benedict states that "the doctrine of the personality of the ship may be described as a fiction"—"but", he adds, "the fiction is rather in the mode of expression than in the substance of the law".

He goes on to point out that "the principle is that one who has a contract, to which the ship is bound and which is breached, or who, through the instrumentality of the ship, has suffered a wrong that is within the maritime jurisdiction, shall have by way of security or redress, an enforceable interest in the ship. The mode of enforcement is that the ship is condemned and sold under a decree which, as it is founded on dominion over the *res*, binds not only the parties who appear in court but all who have any interest in the vessel, or, as the phrase goes, 'all the world.' . . . Remedies *in rem* and *in personam* may co-exist, or one may be independent of the other."[3]

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[3] 1 *Benedict on Admiralty* (6th ed.) 17, 27, sections 11, 16. "A suit in the admiralty to enforce and execute a lien, is not an action against any particular person to compel him to do or forbear any thing; but a claim against all mankind, a suit in rem, asserting the claim of the libellant to the thing, as against all the world. . . . An admiralty lien . . . (is not) 'only a privilege to arrest the vessel for the debt' . . . (but) is a real and vested interest in the thing . . . to be executed by a judicial process against the thing, to which no person is made a party, save by his voluntary intervention and suit". *The Young Mechanic*, 30 FC 873, 876 (CC Me.-1855), per Curtis, Circuit Justice.

This is a unique concept, which obtains only as to vessels in admiralty. If injury is caused by a motor vehicle, the vehicle itself can be made to respond only if its owner himself was at fault, and then only through ancillary process in execution of a judgment first obtained against the owner.

But injury wrongly caused by a ship may be redressed directly against the ship alone, even when her owner was not at fault. Thus, the ship may be sued although she was completely beyond her owner's control and responsibility when the injury was caused.[4]

When, for instance, a vessel under bareboat charter is in collision as a result of negligence of her crew, the vessel is liable *in rem*, even though an action *in personam* would not lie against her owner.[5]

A vessel which has been sold remains liable *in rem* for collision damage caused, prior to the sale, by her fault, although her new owner could not be sued *in personam* for the damage.[6]

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[4] "Such personification of the vessel, treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court." *Canadian Aviator, Ltd. vs United States*, 324 US 215, 224 (1945).

[5] *The Barnstable*, 181 US 464 (1901). See *Turner vs United States*, 27 F2d 134 (CA 2-1928). The "settled rule is that if the shipowner provides the vessel only, and the master and crew are selected by the charterer, the latter and not the shipowner is responsible for their acts." *The China*, 74 US 53, 70 (1868) (concurring opinion).

[6] *The Bold Buccleugh*, 7 Moore 267; 13 ER 884 (1851), discussed in footnote 2 above, approved in *The John G. Stevens*, 170 US 113 (1898). "The maritime 'privilege' or lien . . . accompanies the property into the hands of a bona fide purchaser." *Vandewater vs Mills*, 19 How. 82, 89 (1856). See also *The China*, 74 US 53, 68 (1868).

A ship is liable *in rem* for collision damage resulting from negligence of an independent pilot to whom the owner was required by law to confide his vessel, and for whose wrongful acts the owner is not liable *in personam*.[7]

Other cases in which the vessel may be condemned *in rem*, although the owner is not responsible *in personam*, include forfeitures,[8] non-contract salvage claims,[9] and claims on bottomry bonds.[10]

Such *in-rem* proceedings cannot meaningfully be equated with proceedings *in personam* against the ship's owner; and the cases, cited on pages 20-22 of respondents' brief, holding that the owner or charterer whose liability coincides with that of the ship, may limit the ship's liability as well as his own, do not blur the distinction between admiralty proceedings *in rem* and those *in personam*.

III

This reduces the case to the basic question whether *in-rem* admiralty jurisdiction may be conferred by *ex parte* waiver, by the claimant of the *res*.

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[7] *The China*, 74 US 53 (1868); *Homer Randall Transp. Co vs Compagnie Générale Transatlantique*, 182 US 406 (1901).

[8] *United States vs Brig Malek Adhel*, 2 How. 210 (1844).

[9] *Lambros Seaplane Base vs The Batory*, 215 F2d 228 (CA 2-1954); Rule 18 of this court's Admiralty Rules; Robinson, *Handbook of Admiralty Law* (1939) 737, section 99.

[10] Rule 17 of this court's Admiralty Rules.

It is respectfully submitted that the decisions cited by respondents as indicative of the affirmative view, are erroneous.

Eberhard P. Deutsch,
Attorney for Petitioner.

Deutsch, Kerrigan & Stiles,
Malcolm W. Monroe,
René H. Himel, Jr.,
Of Counsel

April, 1960

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 229

CONTINENTAL GRAIN COMPANY,
Petitioner

versus

BARGE FBL-585
and
FEDERAL BARGE LINES, INC.,
Respondents

MEMORANDUM IN OPPOSITION TO SUGGESTION OF MOOTNESS

On June 10, 1960, this court requested the parties "to express their views on typewritten memoranda, by the close of business on June 16, 1960, as to whether the judgment rendered by the United States District Court for the Western District of Tennessee on December 15, 1958, in its cause No. 3487, in admiralty,[1]—*Federal*

[1] As explained hereunder, that action was not one in admiralty. It was a civil action which had been removed from the Tennessee state court. See R 43.

Barge Lines v. Continental Grain Company—has rendered this case moot".

Statement of the Case

On June 27, 1958—less than a week before the instant *in-rem* admiralty action for cargo damage was filed—Federal Barge Lines, Inc. sued the instant petitioner in a Tennessee state court, to recover $75,000 for physical damage to the Barge *FBL-585*, resulting from the sinking in which the cargo damage had occurred.

After removal to federal court, the Tennessee civil action was tried by jury.

The jury, having been charged that the plaintiff's "recovery should be reduced in proportion to the extent that such remote contributory negligence, contributed to the sinking", returned a general verdict for Federal Barge Lines in the sum of $30,500—less than half the amount sued for.

Argument

This court's suggestion of mootness is presumably predicated on the theory either that (1) petitioner may have lost its right to sue the barge *in rem*, by its failure to file a counterclaim in the Tennessee civil action, or (2) the Tennessee judgment forecloses this admiralty action under the doctrine of *res judicata* or collateral estoppel.

As previously pointed out, the barge was not a party to the Tennessee proceeding, and accordingly was not subject to a counterclaim.[2]

Further, Rule 82, FRCP, provides that the Civil Rules shall not be construed to extend the jurisdiction of the district courts. Since neither the Tennessee federal court, on its civil side, nor the state court in which the suit had originally been filed, could have jurisdiction over an admiralty action *in rem*, petitioner could not have sued the barge *in rem* in the civil action in Tennessee, where the barge was not to be found in any event.[3]

Neither *res judicata* nor collateral estoppel is applicable in this case, for two principal reasons.

First, identity of parties is lacking, since the Tennessee action was a personal action between Federal Barge Lines and petitioner, whereas the instant action is *in rem* against the barge.[4]

Second, even had there been identity of parties, the Tennessee judgment did not foreclose recovery by petitioner in this case.

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[2] See petitioner's original brief, p. 4, note 2.

[3] See Noma Electric Corp. vs Polaroid Corp., 2 FRD 454 (SD NY-1942); Milburn vs Proctor Trust Co., 54 FS 989 (WD La.-1944).

[4] *The Blandon*, 39 F2d 933 (SD NY-1929); *The Eastern Shore*, 1928 AMC 327 (DC Md.); *The Samnanger*, 1924 AMC 517 (SD Ga.); State vs Johnson, 52 NM 229, 195 P2d 1017 (1948); *The Odorilla* vs Baizley, 128 Pa. 283, 18 A. 511 (1889). See also petitioner's reply brief, pp. 2-6, for authorities recognizing the basic difference between *in-rem* and *in-personam* actions.

Instructed to decide the case on comparative-negligence principles, the Tennessee jury returned a verdict for less than half the amount sued for. This was an implicit finding that Federal Barge Lines was itself partly at fault for the sinking.

Certainly this verdict cannot preclude recovery by petitioner in this case, on comparative-negligence principles, of at least part of its cargo damage resulting from the sinking.

It is accordingly respectfully submitted that the instant controversy is not moot.

Eberhard P. Deutsch
Proctor for Petitioner

Deutsch, Kerrigan & Stiles
Malcolm W. Monroe
Of Counsel

June, 1960

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 229

CONTINENTAL GRAIN COMPANY,
Petitioner

versus

BARGE FBL-585
and
FEDERAL BARGE LINES, INC.,
Respondents

SUPPLEMENTAL MEMORANDUM ON MOOTNESS

This memorandum is addressed to respondents' insistence that the Tennessee judgment in another case, amounted to a finding that no negligence of respondent Federal Barge Lines, nor unseaworthiness of the barge, contributed to the sinking.

Respondents contend that the Tennessee case was tried on contributory-negligence, not comparative-negligence, principles; and, on page 3 of their memorandum, state

that, under the charges, "the jury (having found for respondent) must have concluded that the barge was seaworthy".

In the first place, since the Tennessee suit, although a civil action, involved a maritime casualty, it was governed by the rule of comparative, not contributory, negligence,* and it must be assumed that the case was tried under the proper rule.

In the second place, respondents' position is destroyed by the very charge set forth on page 3 of their memorandum, just a few lines before the statement quoted above, in which the court instructed the jury that it should find against the plaintiff (respondent Federal Barge Lines) only if the barge's unseaworthiness caused the sinking "without the intervention or concurrence of any act of negligence on the part of the defendant".

Clearly, the Tennessee verdict was a finding of concurrent negligence of both parties, and it cannot preclude recovery by petitioner in the case at bar.

At the very least, it cannot be denied (as inferentially conceded in respondents' brief—page 3, note 2—and in their memorandum on mootness—pages 8-9) that there is serious doubt whether that was not the finding of the

* *Pope & Talbot, Inc. vs Hawn*, 346 US 406 (1953). Cf. *The Max Morris*, 137 US 1, 14-15 (1890).

Tennessee jury; and such doubt alone vitiates the defense of *res judicata* or collateral estoppel. *DeSollar vs Hanscome*, 158 US 216, 221-22 (1895); *Hayslip vs Long*, 227 F2d 550 (CA 5-1950).*

Eberhard P. Deutsch
Proctor for Petitioner

Deutsch, Kerrigan & Stiles
Malcolm W. Monroe
Of Counsel

June, 1960

* Respondents, in their original brief in this court, conceded, as had the Court of Appeals, that any conceivable question of *res judicata* "must await the determination of the forum which will ultimately try this case on the merits"—Respondents' brief, p. 3.

SUPREME COURT OF THE UNITED STATES

No. 229.—October Term, 1959.

Continental Grain Company, Petitioner, *v.* Barge FBL–585 and Federal Barge Lines, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 27, 1960.]

Mr. Justice Black delivered the opinion of the Court.

The single issue presented for decision in this case is whether the United States District Court in New Orleans, acting under 28 U. S. C. § 1404 (a), erred in ordering that this action for damages to cargo from alleged unseaworthiness be transferred for trial, "in the interest of justice," to the United States District Court at Memphis, Tennessee, where the sinking of the barge occurred. The Court of Appeals affirmed the District Court's transfer order. 268 F. 2d 240. We granted certiorari to consider this important question. 361 U. S. 811.

The facts and circumstances on which the District Court transferred this case are these. Barge FBL–585, a respondent here under an ancient admiralty fiction, is owned by Federal Barge Lines, Inc., the other respondent. After the barge was partially loaded by petitioner, Continental Grain Co., with its soy beans at its wharf in Memphis, the barge sank, causing damages both to the barge and to the soy beans. A dispute arose over what caused it to sink. The barge owner, Federal Barge Lines, Inc., brought an action for damages in a Tennessee state court charging that the barge sank because the cargo owner, Continental Grain Co., had been negligent in loading it. The cargo owner later brought this action in the United States District Court in New Orleans

against the barge and its owner, in a single complaint, charging that the vessel had sunk because of its defects and unseaworthiness, and claiming damages for injury to the cargo. In the meantime the damage case against the grain company had been removed from the Tennessee state court to the United States District Court at Memphis. While the litigation arising out of this single occurrence was in this posture in the New Orleans and Memphis courts, the barge-owner defendant at New Orleans, filed a motion and accompanying affidavits under § 1404 (a) to transfer "this action" to the United States District Court at Memphis alleging that such transfer was "necessary for the convenience of the parties and witnesses and in the interest of justice. . . ." This followed the language of § 1404 (a), which provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The New Orleans District Court found that the issue in the Memphis case

> "that is, the cause of the casualty, is precisely the issue in the case at bar. The convenience of the great majority of witnesses in this case dictates that this case be tried in Memphis. The efficient administration of justice requires that this claim for cargo damage be tried by the same court which is trying the claim for hull damage, both claims being between the same parties, and relate to the same incident."

These findings were well supported by evidence, were approved by the Court of Appeals, are not challenged here, and we accept them. The case, therefore, if tried in New Orleans, will bring about exactly the kind of mischievous consequences against "the interest of jus-

tice" that § 1404 (a) was designed to prevent, that is, unnecessary inconvenience and expense to parties, witnesses, and the public.

The grain company argues that this frustration of the basic purpose of Congress in passing § 1404 (a) is compelled by the language of the section that prevents the transfer of a "civil action" by a District Court to any District Court other than one "where it might have been brought." Two weeks ago this Court decided in *Hoffman* v. *Blaski* and *Sullivan* v. *Behimer*, — U. S. —, that this language bars transfer of a "civil action" properly pending in one District Court to another in which that "civil action" could not have been brought because the defendant legally could not have been subjected to suit there at the time when the case was originally filed. Those cases involved transfers in which the plaintiffs filing the suits would have had no right whatever to proceed originally against the defendants on the "civil actions" in the District Courts to which transfer was sought without the defendants' consent. But in this case there was admittedly a right on the part of the grain company to subject the owner of the barge, with or without its consent, to a "civil action" in Memphis at the time the New Orleans action was brought. Under these circumstances it would plainly violate the express command of § 1404 (a), as construed in our two prior cases, to reverse the District Court's judgment ordering this single civil action to be transferred to Memphis, unless transfer is barred by the joinder of the *in rem* claim against the barge with the claim against the owner itself. The grain company takes this view of the effect of joinder, arguing that since the barge was in New Orleans when this "civil action" was brought and the admiralty *in rem* claim therefore could not have been brought in Memphis at that time, the entire civil action must remain in the inconvenient

New Orleans forum. This view is reached by labeling this single civil action as two, one against the barge and one against the owner. It asserts this view despite the fact that the grain company's suit against the barge and its suit against the owner are in the same complaint for the loss of the same cargo in the same sinking of the same barge producing the same damages. The basis of this view that there are two distinct civil actions for § 1404 (a) purposes is a long-standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgment.[1]

The fiction relied upon has not been without its critics even in the field it was designed to serve. It has been referred to as "archaic," "an animistic survival from remote times," "irrational" and "atavistic."[2] Perhaps this is going too far since the fiction is one that certainly had real cause for its existence in its context and in the day and generation in which it was created. A purpose of the fiction, among others, has been to allow actions against ships where a person owning the ship could not be reached, and it can be very useful for this purpose still. We are asked here, however, to transplant this ancient saltwater admiralty fiction into the dry-land context of *forum non conveniens*, where its usefulness and possibilities for good are questionable at best. In fact, the fiction appears to have no relevance whatever in a District

[1] "A ship is the most living of inanimate things. Servants sometimes say 'she' of a clock, but every one gives a gender to vessels. And we need not be surprised, therefore, to find a mode of dealing which has shown such extraordinary vitality in the criminal law applied with even more striking thoroughness in the Admiralty. It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical." Holmes, The Common Law (1881), 26-27.

[2] *The Carlotta*, 48 F. 2d 110, 112, 1931 A. M. C. 742, 745 (C. A. 2d Cir. 1931), quoted in Gilmore and Black, Admiralty (1957), 508.

Court's determination of where a case can most conveniently be tried. A fiction born to provide convenient forums should not be transferred into a weapon to defeat that very purpose.

This Court has not hesitated in the past to refuse to apply this same admiralty fiction in a way that would cut down, as it would here, the scope of congressional enactments. In fact, Mr. Justice Bradley, speaking for the Court, said at one time, in construing a statute which had limited a shipowner's liability but had failed to refer to the "personal" liability of the vessel:

> "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of the property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated. . . ." *City of Norwich*, 118 U. S. 468, 503.

Fifty-seven years later this Court was confronted with a similar argument about another section of the same statute, and after referring to the analysis in *City of Norwich* concluded,

> "The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age. . . . Congress has said that the owner shall not 'answer for' this loss in question. Claimant says this means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execution against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property." *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo*, 320 U. S. 249, 253–254.

We follow the common-sense approach of these two cases in interpreting § 1404 (a). Failure to do so would practically scuttle the *forum non conveniens* statute so far as admiralty actions are concerned. All a plaintiff would need to do to escape from it entirely would be to bring his action against both the owner and the ship, as was done here. This would be all the more unfortunate since courts have long recognized "admiralty's approach to do justice with slight regard to formal matters," [3] and, as this Court has recently observed,

> "Admiralty practice, which has served as the origin of much of our modern federal procedure, should not be tied to the mast of legal technicalities it has been the forerunner in eliminating from other federal practices." *British Transport Comm'n* v. *United States*, 354 U. S. 129, 139.

It is relevant that the law of admiralty itself is unconcerned about the technical distinctions between *in rem* and *in personam* actions for purposes of transferring admiralty actions from one court to a more convenient forum. This Court's Admiralty Rule 54, which prescribes the procedures for owners limiting their liability after vessels have been libeled, provides in language broader than § 1404 (a): "The District Court may, in its discretion, transfer the proceedings to any district for the convenience of the parties." And it may be further observed that courts have not felt themselves bound by this fiction when confronted with the argument that because *in rem* and *in personam* actions involve different parties, therefore *res judicata* does not apply from an *in personam* action against an owner to an *in rem* action

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[3] *Point Landing, Inc.*, v. *Alabama Dry Dock & Shipbuilding Co.*, 261 F. 2d 861, 866, 1959 A. M. C. 148, 155 (C. A. 5th Cir. 1958).

against his ship.[4] It is interesting in this connection to take note of the fact that, according to the Court of Appeals opinion, the case at Memphis has already been tried.[5] To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404 (a) was designed to prevent. Moreover, such a situation is conducive to a race of diligence among litigants for a trial in the District Court each prefers. These are additional reasons why § 1404 (a) should not be made ambiguous by the importation of irrelevant fictions.

The idea behind § 1404 (a) is that where a "civil action" to vindicate a wrong—however brought in a court—presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, after findings, transfer the whole action to the more convenient court. That situation exists here. Although the action in New Orleans was technically brought against the barge itself as well as its owner, the obvious fact is that, whatever other advantages may result, this is an alternative way of bringing the owner into court. And although any judgment for the cargo owner will be technically enforceable against the barge as an entity as well as its owner, the practical economic fact of the matter is that the money paid in satisfaction of it will have to come out of the barge owner's pocket—including the possibility of a levy upon the barge even had the cargo owner not prayed for "personified" *in rem* relief. The crucial issues about fault

[4] See *Burns Bros.* v. *Central R. Co.*, 202 F. 2d 910, 1953 A. M. C. 718 (C. A. 2d Cir. 1953); *Sullivan* v. *Nitrate Producers' S. S. Co.*, 262 F. 371 (C. A. 2d Cir. 1919); *Bailey* v. *Sundberg*, 49 F. 583 (C. A. 2d Cir. 1892); Gilmore and Black, Admiralty (1957), 507–509.

[5] 268 F. 2d 240, 242, n. 2, 1959 A. M. C. 2158, 2160, n. 2.

and damages suffered were identical, whether considered as a claim against the ship or its owner. The witnesses were identical. Thus, while two methods were invoked to bring the owner into court and enforce any judgment against it, the substance of what had to be done to adjudicate the rights of the parties was not different at all. Treating both methods for § 1404 (a) purposes for what they are in a case like this—inseparable parts of one single "civil action"—merely permits or requires parties to try their issues in a single "civil action" in a court where it "might have been brought." To construe § 1404 (a) this way merely carries out its design to protect litigants, witnesses and the public against unnecessary inconvenience and expense, not to provide a shelter for *in rem* admiralty proceedings in costly and inconvenient forums.

For the reasons stated here the judgment is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 229.—October Term, 1959.

Continental Grain Company, Petitioner, v. Barge FBL-585 and Federal Barge Lines, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 27, 1960.]

Mr. Justice Frankfurter whom Mr. Justice Harlan joins.

Although this case also involves some nice questions of admiralty procedure, since the claimant barge owner has moved for transfer and has agreed to "pay any final decree which may be rendered against" the barge the controlling considerations for me are those set forth in my opinion in *Sullivan* v. *Behimer*, — U. S. —, June 13, 1960. Accordingly, I would affirm the judgment.

SUPREME COURT OF THE UNITED STATES

No. 229.—October Term, 1959.

Continental Grain Company, Petitioner, *v.* Barge FBL–585 and Federal Barge Lines, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 27, 1960.]

Mr. Justice Whittaker, with whom Mr. Justice Douglas joins, dissenting.

I think that this case, if its true facts be recognized and faced, is controlled by the Court's opinion in *Hoffman* v. *Blaski* and *Sullivan* v. *Behimer*, decided just the other day, *post*, p. —. I also think that the Court's opinion fails to recognize and face the crucial fact—that one of the two claims in this "civil action" was brought *in rem* against the Barge, not as an attachment or "device" to force appearance of the owner or to provide security for the payment of any *in personam* judgment which might be recovered against the owner, but as a personified "debtor or offending thing" as the settled law authorizes [1]—which gives rise to the principal question that produces my disagreement. Indeed, I think the Court's opinion endeavors to sweep that crucial fact "under the rug." I will now undertake to make a plain and chronological statement of the simple facts.

On July 2, 1958, petitioner, Continental Grain Company,[2] brought this libel *in personam* against Federal

[1] See note 15, *infra*.

[2] Petitioner, Continental Grain Company, is a Delaware corporation maintaining its principal office in New York, New York, but is also authorized to do and is doing business in the City of Memphis in the Western District of Tennessee.

Barge Lines, Inc.,[3] and *in rem* against Barge FBL–585 ("Barge"), in and on the admiralty side of the United States District Court for the Eastern District of Louisiana, New Orleans Division—where the Barge then was, and ever since has been, located—to recover damages in the sum of $90,000 to petitioner's cargo, caused by the alleged unseaworthiness and consequent partial sinking of the Barge while being loaded at Memphis, Tennessee, on November 6, 1957. The libel prayed a decree against both Federal Barge Lines, Inc., and Barge FBL–585, for the cargo damage; that Federal Barge Lines, Inc., be cited to appear and answer; that process issue against "Barge FBL–585 and that all persons claiming any interest in said vessel be cited to appear and answer this libel," and that "Barge FBL–585 be condemned and sold to pay the amount due libelant herein."

After Federal Barge Lines, Inc., was served with process, and after process had issued against the Barge but before actual arrest of the Barge thereunder, Federal Barge Lines, Inc., on July 23, 1958, delivered its letter addressed to petitioner, which the latter accepted and has acted on, saying, in pertinent part, that: "In consideration of your not having seized [the barge], under the *in rem* process which has been issued . . . and in further consideration of our not being required to post the usual bond for the release of that vessel, [w]e agree that we shall . . . file claim to Barge FBL 585 and [shall file] pleadings in the . . . action, and that, [whether the] vessel [be] lost or not, we shall pay any final decree which may be ren-

[3] Federal Barge Lines, Inc., a Delaware corporation, is a common carrier by water, operating on the Mississippi River and its principal tributaries, and has offices and does business, in, among other places, Memphis, Tennessee, and New Orleans, Louisiana.

dered against said vessel in said proceedings." The last paragraph of the letter said:

> "It is the intent of this undertaking that the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in rem* process, and released by the filing of claim and release bond [;] we, as claimant, reserving in behalf of the vessel all other objections and defenses otherwise available except those which might be predicated upon the fact that the vessel was not actually so seized."

Accordingly, on July 29, 1958, Federal Barge Lines, Inc., filed its claim to "Barge FBL-585, proceeded against herein, and claim[ed] the said barge as owner and pray[ed] that it be permitted to defend according to law"; and on September 18, 1958, it filed its answer to the libel.

On October 13, 1958, Federal Barge Lines, Inc., filed its motion to transfer "this action to the United States District Court for the Western District of Tennessee, Western Division, on the ground that such transfer is necessary for the convenience of the parties and witnesses and in the interest of justice as will appear from the affidavit attached hereto and made a part hereof."[1]

[1] The principal averments of the affidavit referred to were (1) that on June 27, 1958, Federal Barge Lines, Inc., filed an action at law against petitioner, Continental Grain Company, in the Circuit Court of Shelby County, Tennessee, for damages to its Barge FBL-585, caused by the alleged negligence of the grain company in loading it at Memphis on November 6, 1957, which action was removed by the

After hearing, the District Court granted the motion and ordered the action transferred as requested by the movant, but the district judge, acting under the Interlocutory Appeals Act, 28 U. S. C. § 1292 (b), "certified that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation."[5]

Petitioner then sought and was allowed an appeal by the Court of Appeals under 28 U. S. C. § 1292 (b).[6] That court, relying heavily on its opinion in *Ex parte Blaski*, 245 F. 2d 273, affirmed, 268 F. 2d 240, and we granted certiorari, 361 U. S. 811.

Although the Court of Appeals found "that fair application of the letter undertaking . . . requires that we treat it as though, upon the libel being filed, the vessel had actually been seized, a Claim filed, a stipulation to abide decree with sureties executed and filed by Claimant, and the vessel formally released," it held that, inasmuch

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grain company to the United States District Court for the Western District of Tennessee on July 15, 1958, and (2) that the necessary witnesses reside in or nearer to Memphis than to New Orleans.

[5] In his unpublished *per curiam* the district judge said, *inter alia*: "The libel is in rem as to the Barge FBL-585. While this libel could have been originally brought in the Western District of Tennessee against the respondent, Federal Barge Lines, the owner of the barge, the libel as to the barge itself would ordinarily be restricted to the place where the barge is located at the time the libel is filed. At that time, and now, the barge is located in this district. However, since the barge was neither seized by the Marshal nor bonded by respondent, libellant having accepted respondents' letter undertaking to respond to any decree entered herein, and since the owner thereof, Federal Barge Lines, apparently is financially able to respond to any decree rendered against it, the interest of justice would best be served by . . . transferring this case to the Western District of Tennessee."

[6] The District Court stayed its order of transfer, pending determination of the appeal.

as the claimant-respondent had by its motion to transfer consented "to an unlimited submission of the cause [to the Tennessee District Court] even though it could not have been filed there initially," transfer of the *in rem* action to that court "presents no real or conceptual difficulties," because "[t]he Court does not undertake to transfer the *res*, nor does it even attempt to transfer the cause while the *res* is still in custody of the Court"; that when, as here, a "bond (stipulation)" is given and substituted for the vessel "[t]raditional notions are not affected if that security floats with the cause wherever the law navigates it." *Id.*, at 243, 244.

It is not disputed that the libel, insofar as it is *in personam*, might have been brought by petitioner against respondent, Federal Barge Lines, Inc., in the United States District Court for the Western District of Tennessee, as that court had jurisdiction to entertain such an action and Federal Barge Lines, Inc., was amenable to the service of monition there. Hence, if this libel had been brought only *in personam* against Federal Barge Lines, Inc.—*i. e.*, had omitted the claim *in rem* against the Barge—it could have been transferred to the Tennessee District, for such an action could have been brought in that forum. But, as the parties agree, petitioner had a legal right to join in one action, as it did here, a claim *in personam* against Federal Barge Lines, Inc., and one *in rem* against the Barge.[7] The Court's opinion says that, because the claim *in personam* might have been brought in the Memphis forum, it is a mistake to say that "the entire civil action must remain in the inconvenient New Orleans forum." But respondent's motion did not ask

[7] *Newell* v. *Norton*, 3 Wall. 257; *In re Fassett*, 142 U. S. 479, 484 ("The district court had jurisdiction to determine the question, because it has jurisdiction of the vessel by attachment, and of Fassett by monition . . . ."); *The Resolute*, 168 U. S. 437, 442; *Turner* v. *United States*, 27 F. 2d 134, 136 (C. A. 2d Cir.).

transfer of only the claim *in personam*; if indeed the court could have severed the two claims and have transferred one and kept the other—a matter not at all dealt with in the Court's opinion. Instead it asked transfer of the whole action, and so we are presented with the question whether an admiralty action *in rem*, or partly *in rem*, may be transferred, upon application of the claimant of the *res*, to a district in which the *res* is not located, and in which the libellant did not have a legal right to bring it.

The Court treats this case as a "single" damage action against only the barge owner. That treatment simply ignores the crucial fact which gives rise to the question we have here. Of course, if this were simply a "single" action for damages against only the barge owner we would not have the question that confronts us; for we all agree that such an action "might have been brought" in the Memphis forum, and, hence, if brought elsewhere it could have been transferred to that forum under § 1404 (a). But those are not the facts. The facts are that there were two claims in *this* "civil action," one *in personam* against the owner, and one *in rem* against the Barge. And we cannot decide the question presented by denying its existence or if we ignore the facts that created it. One of the two claims of *this* "civil action" was *in rem* against the Barge. The Barge was in New Orleans when this suit was brought. Therefore, *this* "civil action" could not have been brought in Memphis, and, hence cannot be transferred to that forum if the limiting words of § 1404 (a), "where it might have been brought," are to have any meaning.

Petitioner, relying on the established principle that an action *in rem* may be brought only in the district where the *res* is located,[1] or possibly, under the accustomed prac-

[1] *The Brig. Ann.* 9 Cranch 289, 291; *Miller* v. *United States*, 11 Wall. 268, 294; *United States* v. *Mack*, 295 U. S. 480, 484; *Clinton Foods* v. *United States*, 188 F. 2d 289, 292 (C. A. 4th Cir.); *Fettig*

tice in admiralty, in the district where, as alleged in the libel, the *res* (vessel) will be "during the pendency of the process [issued on the libel]." [9] contends that inasmuch as the Barge was located in the Eastern District of Louisiana when the libel was filed, *this action* could not have been brought or prosecuted in any other district and, hence, the court was without power, under 28 U. S. C. § 1404 (a),[10] to transfer it, upon respondent's motion and even with their waiver of venue and jurisdiction, to the Western District of Tennessee, where it could not have been brought by the libellant. This contention accords with our opinion in the *Blaski* and *Behimer* cases, *post*, p. ——.

But respondents contend that an admiralty court is not subject to the provision of § 1404 (a) limiting the transfer of an action to a district "where it might have been brought," but is empowered by Admiralty Rule 44 to transfer an action, on the motion of the claimant-respondent and a mere showing of convenience, to any other district. This contention is wholly without merit. Admiralty Rule 44,[11] which in effect authorizes District

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Canning Co. v. *Steckler*, 188 F. 2d 715, 717–718 (C. A. 7th Cir.) Cf. *Torres* v. *Walsh*, 221 F. 2d 319, 321 (C. A. 2d Cir.); *Broussard* v. *The Jersbek*, 140 F. Supp. 851, 852–853.

[9] Notwithstanding the provision of Admiralty Rule 22 (28 U. S. C.) that if the libel be *in rem* it shall state "that the property is within the district," we are told that in practice the common, if not universal, jurisdictional statement in libels *in rem* recites "That the vessel now is, or, during the pendency of process herein, will be, within the District and the jurisdiction of the Court." See *Internatio-Rotterdam, Inc.*, v. *Thomsen*, 218 F. 2d 514, 515–516 (C. A. 4th Cir.)—in some other aspects an anomalous opinion.

[10] "§ 1404. Change of venue.

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[11] Rule 44. "Right of trial courts to make rules of practice.

"In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in

Courts to formulate local rules of practice, is expressly limited to "cases not provided for by these rules or by statute . . . ." The matter of transferring "any civil action"—which phrase includes actions in admiralty [12]—is expressly prescribed by a statute. Section 1404 (a) expressly limits a District Court's power to transfer a civil action to a district or division "where it might have been brought." *Hoffman* v. *Blaski*, *supra*. The power to transfer actions cannot derive from local practice but only from substantive law. Nor is there any showing here that the District Court has ever even purported to promulgate any applicable local rule of practice.

Respondents next contend that even if § 1404 (a) applies to the transfer of admiralty actions, that section does not preclude transfer of an admiralty action *in rem* to a district where the *res* is not located if the claimant-respondent, after having prevented the arrest or procured the release of the *res* by giving bond or other acceptable security, so moves and agrees to submit to the jurisdiction of the transferee court. They argue that authority to proceed in admiralty against the *res* (vessel) is a mere security device and, after the claimant-respondent has prevented the arrest or procured the release of the *res* by giving bond or other acceptable security, the *in rem* action is converted into one *in personam*, and may accordingly be transferred under § 1404 (a), on motion of the claimant-respondent (but not of the libellant) [13] and a finding

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such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules."

[12] *Torres* v. *Walsh*, 221 F. 2d 319, 321 (C. A. 2d Cir.); *International Rotterdam, Inc.*, v. *Thomsen*, 218 F. 2d 514, 515 (C. A. 4th Cir.), and see *Ex parte Collett*, 337 U. S. 55, 58; *United States* v. *National City Lines, Inc.*, 337 U. S. 78.

[13] Respondents say in their brief:

"A transfer on motion of a claimant and a transfer on motion of a libellant are two different things. We do not here contend, and it

of convenience, to any other district in which the action if originally *in personam* "might have been brought." The Court appears to agree with that argument. It criticizes the settled doctrine of personification of the ship. It says that "perhaps [it] is going too far [to refer to the fiction of personification of the ship] as 'archaic,' 'an animistic survival from remote times,' 'irrational' and 'atavistic,' " (citing *The Carlotta*, 48 F. 2d 110, 112), but it does not suggest that the numerous cases of this Court which have established and adhered to that "fiction" for more than 150 years should be overruled—something I could understand, even at this late day. Instead, it seems merely to brush them aside or to fail to recognize their application here.

But admiralty proceedings *in rem* are not a mere security device. From its earliest history to the present time, this Court has consistently held that an admiralty proceeding *in rem* is one essentially *against the vessel itself as the debtor or offending thing;* and, in such an action the vessel itself is impleaded as the defendant, seized, judged and sentenced.[14] In *Rounds* v. *Cloverport*

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is our submission that it would be error for a Court to hold, that a coercive transfer of a claimant to a different jurisdiction than that in which the suit was filed is proper. The concept of transferee jurisdiction is that there must be two available forums, and unless the moving party is the claimant, there is no secondary or transferee forum to which the case could be transferred."

Nothing in § 1404 (a), or in its legislative history, suggests such a unilateral objective and we should not, under the guise of interpretation, ascribe to Congress any such discriminatory purpose. See *Hoffman* v. *Blaski*, *post*, p. —, —.

[14] *The Mary*, 9 Cranch 126, 144; *The Moses Taylor*, 4 Wall. 411; *The Belfast*, 7 Wall. 624; *The Glide*, 167 U. S. 606; *The Robert W. Parsons*, 191 U. S. 17; *Rounds* v. *Cloverport Foundry*, 237 U. S. 303, 306–307.

"A ship is the most living of inanimate things. Servants sometimes say 'she' of a clock, but every one gives a gender to vessels. And we need not be surprised, therefore, to find a mode of dealing which has

Foundry, 237 U. S. 303, Mr. Justice Hughes, in distinguishing between *in rem* actions against a vessel, on the one hand, and attachments against a vessel to force appearance of the respondent or to provide security in an action *in personam*, on the other hand, said:

> "Actions *in personam* with a concurrent attachment to afford security for the payment of a personal judgment are in a different category. *The Belfast, supra*; *Taylor* v. *Carryl*, 20 How. 583, 598, 599; *The Robert W. Parsons, supra*. And this is so not only in the case of an attachment against the property of the defendant generally, but also where it runs specifically against the vessel under a state statute providing for a lien, if it be found that the attachment was auxiliary to the remedy *in personam*. *Leon* v. *Galceran*, 11 Wall. 185; see also *Johnson* v. *Chicago &c. Elevator Co.*, 119 U. S. 388, 398, 399; *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638, 646, 648." *Id.*, at 307.

Indeed, the absence of liability of the owner of a vessel does not necessarily exonerate the vessel itself.[15] If, for example, a vessel under bareboat charter damages another as the result of the negligence of her crew, the vessel is liable *in rem* even though an action *in personam* would

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shown such extraordinary vitality in the criminal law applied with even more striking thoroughness in the Admiralty. It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical." Holmes, The Common Law (1881), 26–27.

[15] "Such personification of the vessel, treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court." *Canadian Aviator, Ltd.*, v. *United States*, 324 U. S. 215, 224.

not lie against her owner.[16] Likewise, the right of one damaged by the wrong of a vessel to proceed against her follows her into the hands of an innocent purchaser, although the latter is not liable *in personam*.[17] Similarly, a vessel is liable *in rem* for damages resulting from her negligent operation by an independent pilot to whose control the law required her to be confined, although her owner is not liable *in personam*.[18]

The cases cited by the Court,[19] holding that in expressly exonerating by statute shipowners from certain liabilities for casualty losses of cargo at sea, Congress similarly intended to exonerate their property, *i. e.*, their ships, from such liabilities, are wholly inapposite. They involved only interpretation of particular statutes, and did not at all deal with, and certainly were not intended to destroy, for they expressly recognized, the historic difference and distinction between admiralty actions *in personam* and those *in rem*. Nor does this Court's Admiralty Rule 54, discussed by the Court, touch the question of transferability of this case. This is not a limitation of liability proceeding, specially covered by that Rule, and the parties make no such claim. Rather we have here only a simple motion to transfer a "civil action" from one District to another, and such a motion is exclusively governed by § 1404 (a).

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[16] *The Barnstable*, 181 U. S. 464. The "settled rule is that if the ship-owner provides the vessel only, and the master and crew are selected by the charterer, the latter and not the ship-owner is responsible for their acts." *The China*, 7 Wall. 53, 70.

[17] "The maritime 'privilege' or lien . . . accompanies the property into the hands of a bona fide purchaser." *Vandewater* v. *Mills*, 19 How. 82, 89. See also *The China*, 7 Wall. 53, 68; *The John G. Stevens*, 170 U. S. 113.

[18] *The China*, 7 Wall. 53; *Homer Randall Transp. Co.* v. *Compagnie Générale Transatlantique*, 182 U. S. 406.

[19] *City of Norwich*, 118 U. S. 468, 503; *Consumers Import Co.* v. *Kabushiki Kaisha Kawasaki Zosenjo*, 320 U. S. 249, 253–254.

The Barge itself being the "offending thing," and here being itself subject to suit, and having been sued, *in rem*, we think it may not be said that the giving by respondent, Federal Barge Lines, Inc., and the acceptance by petitioner, of the "letter undertaking," to prevent the physical arrest of the Barge, converted the *in rem* action into one *in personam*. That letter expressly said that the rights of the parties would for all purposes be "precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in rem* process, and released by the filing of claim and release bond . . . ." That this letter was legally effective in accordance with its terms is not disputed. This Court has from an early day consistently held that a bond, given to prevent the arrest or to procure the release of a vessel, *is substituted for and stands as the vessel in the custody of the court.*[20] Inasmuch as the parties agreed that the letter involved here was to have precisely the same effect as a bond, it follows that the letter is, just as a bond would have been, a substitute for the vessel in the custody of the court, and that the giving and accepting of the letter did not convert the *in rem* action into one *in personam*.

Respondents finally argue that even though the Barge itself could be and was sued as the "offending thing" and, being located in the district of suit, this action *in rem*

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[20] *The Palmyra*, 12 Wheat. 1, 10; *The Webb*, 14 Wall. 406, 418; *The Wanata*, 95 U. S. 600, 611; *United States* v. *Ames*, 99 U. S. 35. In Judge Woolsey's very perceptive opinion in *J. K. Welding Co.* v. *Gotham Marine Corp.*, 47 F. 2d 332 (D. C. S. D. N. Y.), the rule was summarized as follows:

"The stipulation for value is a complete substitute for the *res*, and the stipulation for value alone is sufficient to give jurisdiction to a court because its legal effect is the same as the presence of the *res* in the court's custody." See also Gilmore and Black, The Law of Admiralty, at 650-651.

against it could not have been brought elsewhere without respondent's consent, it was as possible for the Barge voluntarily to enter appearance in and submit to the venue and jurisdiction of the transferee court as it would have been for one sued *in personam* to do so,[21] and that their motion to transfer had that effect. Whether jurisdiction over a *res* in an action *in rem* may be conferred by consent of its owner, given either before or after the action has been brought, upon a court that does not have territorial jurisdiction or custody of the *res* we need not decide, for the question here is not such, but, rather, it is simply whether a District Court is empowered by § 1404 (a) to transfer such an action to a district in which the libellant did not have the right to bring it, independently of the will or wishes of the claimant-respondent. That question was ruled in the negative by *Hoffman v. Blaski, post,* p. —, and I think it follows that the judgment in this case should be reversed.

[21] See *J. K. Welding Co. v. Gotham Marine Corp.*, 47 F. 2d 332, 335 (D. C. S. D. N. Y.).